

CW Exhibit: # 1

Date: 4/28/03

Judge: JMR

Case #: K102888

FAIRFAX COUNTY POLICE DEPARTMENT

WARNING AND CONSENT

ON 11-7 2002, AT 555 A.M. (P.M.)

AT C.I.B., I WAS ADVISED BY OFFICER / DETECTIVE

Boyle / Garrett ^{FBP} OF THE FAIRFAX COUNTY POLICE DEPARTMENT THAT HE WAS
INVESTIGATING THE COMMISSION OF THE CRIME OF Homicide, AND THAT:

- ya 1. I HAVE THE RIGHT TO REMAIN SILENT. I AM NOT REQUIRED TO SAY ANYTHING TO ANYONE AT ANY TIME OR ANSWER ANY QUESTIONS.
- ya I understand 2. ANYTHING I DO OR SAY CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW.
- ya 3. I HAVE THE RIGHT TO TALK TO A LAWYER BEFORE BEING QUESTIONED AND I ALSO HAVE THE RIGHT TO HAVE THE LAWYER WITH ME WHILE BEING QUESTIONED.
- ya 4. IF I CANNOT AFFORD A LAWYER, AND WANT ONE, ONE WILL BE PROVIDED FOR ME.
- ya 5. IF I WANT TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, I WILL STILL HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME. I ALSO HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME IF I WANT TO TALK TO A LAWYER.

CONSENT TO SPEAK

I KNOW WHAT MY RIGHTS ARE. I UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES
OR THREATS HAVE BEEN MADE TO ME BY ANYONE.

EDUCATION: 12th
DRUGS OR ALCOHOL: no
READ AND WRITE ENGLISH yes
JUVENILES, DO YOU WANT A PARENT / GUARDIAN HERE BEFORE WE INTERVIEW YOU? _____

WARNING AND CONSENT WAS READ TO SUBJECT X LEE B. MAHO

X X
PERSON BEING INTERVIEWED

SIGNATURE OF THE OFFICER: Y O

DEF-EX # 1
DATE 4/28/03
JUDGE JMR
CASE # 102888

CW Exhibit: # 2

Date: 4/28/03

Judge: JMR

Case #: K102888

☒ TACOMA POLICE DEPARTMENT
☐ PIERCE COUNTY SHERIFF'S DEPARTMENT
☐ OTHER: _____

INCIDENT
NUMBER

02-09430946

LOCATION:

1015 N. PEARL

DATE:

2-12-02

OFFICER:

BOROSEWICZ

TIME:

1820

NAME: (LAST, FIRST, MIDDLE)

MUHAMMAD, JOHN A

JR

(DATE OF BIRTH):

2-17-85

ADVISEMENT OF RIGHTS

Before questioning and the making of any statement, I am going to advise you of your rights:

1. You have the right to remain silent;
2. Any statement that you do make can be used as evidence against you in a court of law; (if you are under the age of 18, anything you do say may be used against you in Juvenile Court; or if you are transferred to an adult status, then anything you say may be used against you in criminal proceedings in Adult Court);
3. You have the right at this time to talk to an attorney of your choice and to have your attorney present before and during questioning and the making of any statement;
4. If you cannot afford an attorney, you are entitled to have one appointed for you without cost to you and to have the attorney present at any time during any questioning and the making of any statement;
5. You may stop answering questions or ask for an attorney at any time during any questioning and the making of any statement.

To be asked by the officer:

1. Do you understand each of these rights which I have explained to you?
2. Having been made fully aware of these rights, do you voluntarily wish to answer questions now?

Signature

WITNESS SIGNATURE

WITNESS SIGNATURE

WITNESS PRINTED NAME/TITLE

WITNESS PRINTED NAME/TITLE

PLF DEF EX #

DATE 4/28/03

JUDGE JMR

CLERK 102888

CW Exhibit: # 3

Date: 4/28/03

Judge: JMR

Case #: K102888

Initial Appearance
Appointment of Counsel
Appointment of Guardian Ad Litem

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

_____)
In Re)
Alleged Material Witness) Criminal Docket No. Not Yet Assigned
JUVENILE) (Later Assigned as 02-0474)
(Lee Boyd Malvo))
_____)

Baltimore, Maryland
October 24, 2002
2:55 PM to 5:01 PM

The above-entitled matter came on before
The Honorable James K. Bredar

A P P E A R A N C E S

On Behalf of the Government:
A. David Copperthite, Assistant U.S. Attorney
James M. Trusty, Assistant U.S. Attorney

On Behalf of the Alleged Material Witness:
Joshua R. Treem, Esquire
Andrew Jay Graham, Esquire, Guardian Ad Litem
Max Higgins Lauten, Esquire, Guardian Ad Litem

ALSO PRESENT

Donald Donovan, Chief Deputy Marshal
William Henry, Chief, U.S. Probation & Pretrial Services
Barbara Skidmore, Deputy Chief, Pretrial Services Officer
Trent Cornich, Pretrial Services Officer
Kenneth Langston, Pretrial Services Officer
FBI Special Agent Christopher Braga
ATF Special Agent Scott Riordan

PLE DEF EX # 3
DATE 4/28/03
JUDGE JMR
CASE # 102888

Sharon Cook, Official Court Reporter, U.S. District Court

PROCEEDING HELD OCTOBER 24, 2002

THE COURT: Good afternoon.

COUNSEL: Good afternoon, Your Honor.

THE COURT: Mr. Copperthite, for the government.

MR. COPPERTHITE: Yes, Your Honor. With Mr. Trusty.

THE COURT: You may call the case.

MR. COPPERTHITE: Your Honor, I do not have the case number, but this is a motion for issuance of a material witness arrest warrant and the affidavit in support thereof, and we are here for appointment of a guardian ad litem.

THE COURT: Right. Let me begin by noting that I don't have any paperwork. I understand that one of my colleagues has within the last 24 hours issued a warrant for the arrest of the person who you brought here; is that correct?

MR. COPPERTHITE: That is correct, Your Honor. Judge Schulze in Greenbelt issued the material witness arrest warrant.

THE COURT: Do we have a copy of that?

MR. COPPERTHITE: Because of the nature of this particular case, she maintained the originals. She has the originals under seal.

THE COURT: All right. Mr. Goldsmith, let's take some steps to try to get at least a copy of the original up into this courtroom as we are proceeding this afternoon. That's not going to stop us right now, but I do want to have that in hand.

Okay. The first question is this, Mr. Copperthite. Is the person who you have brought here to court today an adult or a juvenile?

MR. COPPERTHITE: The person you have before you, Your Honor, is a juvenile.

THE COURT: Okay. Before we go any further then, let me note that the United States Code has set out certain procedures which must be followed in the handling of an appearance by a juvenile. The statute speaks specifically of juveniles brought before this Court in relation to allegations that they are delinquent. It is my understanding that we are not squarely here under those circumstances, but, nonetheless, unless the government sees it otherwise, I think that at least by analogy those are the most appropriate procedures to follow here.

MR. COPPERTHITE: I agree, Your Honor.

THE COURT: In that case, we will follow those procedures. One of the requirements is that the court proceeding be conducted on essentially an in camera basis, without there being access from the public and the press and other persons who are not directly involved.

In addition, there are requirements or at least good practice that would dictate that we make sure that the courtroom is secure and that unauthorized persons do not have access to this room during the course of these proceedings.

Let me note for the record that the courtroom door does have windows in it but, at this time, those windows have been covered so no one can see through them.

I note the presence of the Chief Deputy Marshal, and I am going to ask that he now go ahead and lock the courtroom door so that access from the public side of the courtroom is not possible.

Mr. Marshal, has the courtroom door been locked?

CHIEF DEPUTY MARSHAL DONOVAN: It is, Your Honor.

THE COURT: We have locked it at the vestibule? Is that where we have locked it? And there is no one in the vestibule other than Marshal Service personnel; is that correct?

CHIEF DEPUTY MARSHAL DONOVAN: That's correct, Your Honor.

THE COURT: Okay. We are now going to make a record of who is present in the courtroom, before we begin this proceeding.

Obviously, Mr. Copperthite is here for the government. Your colleague is?

MR. COPPERTHITE: James Trusty.

THE COURT: Mr. Trusty, good afternoon to you.

MR. TRUSTY: Good afternoon, Your Honor.

THE COURT: And who else joins you at the government's table?

MR. COPPERTHITE: Special Agent Chris Braga and Special Agent Scott Riordan.

THE COURT: Very well.

I have already noted the presence of the Chief Deputy U.S. Marshal, Mr. Donovan.

I see two gentlemen who are in FBI jackets, and I presume that the person who is in the courtroom is in their custody. Would you please identify yourselves.

SPECIAL AGENT MOODY: Special Agent Stan Moody, FBI, Baltimore.

SPECIAL AGENT WILLIAMS: Special Agent Jeff Williams, FBI, Baltimore.

THE COURT: Thank you.

A Court Security Officer has just entered the courtroom. If you would identify yourself, please.

CSO GUNTER: Officer David Gunter.

THE COURT: Thank you.

Moving to the first row of the courtroom, I see representatives of the Court's Pretrial Services Office. Would you please each identify yourselves.

MR. CORNICH: Trent Cornich.

MR. LANGSTON: Ken Langston.

MR. HENRY: Bill Henry.

MS. SKIDMORE: Barbara Skidmore.

THE COURT: For the record, Mr. Henry is the Chief of

Probation and Pretrial Services. All the others are members of the Pretrial Services Office.

Moving to the left side of the courtroom, I see two members of the bar of this court, Mr. Max Lauten and Mr. Andrew Jay Graham; is that correct?

MR. GRAHAM: That is correct, Your Honor.

THE COURT: You are here at the Court's request; is that correct?

MR. GRAHAM: That's correct, Your Honor.

THE COURT: Moving now to the defense table, first of all, the gentlemen who are standing. Would you please each identify yourselves.

MR. PEACH: Joseph Peach, Contract Guard with the U.S. Marshals Service.

THE COURT: Yes, sir.

MR. FREDERICK: Deputy U.S. Marshal Mark Frederick.

THE COURT: Okay. I am now addressing myself to the gentleman who is seated before me in a green jumpsuit and a white T-shirt. Sir, would you please tell us what your name is.

(The gentleman then shook his head, indicating no.)

THE COURT: Do you decline to answer the question?

(The gentlemen then nodded his head, indicating yes.)

THE COURT: Very well. Let the record reflect that there is a gentleman whose race appears to be black who is

seated at the defense table. As I indicated previously, he is in a dark-green jumpsuit and a white T-shirt.

Mr. Copperthite, is this the person that you and your colleagues from the government have brought to court today in relation to these proceedings and who is the subject of these proceedings?

MR. COPPERTHITE: Yes, it is, Your Honor.

THE COURT: All right. Let me continue with the identification of the persons who are present.

My Courtroom Deputy Clerk, Mr. Howard Goldsmith, is seated before me.

The Court Reporter, Ms. Sharon Cook, is taking these proceedings down stenographically.

And, last of all, my law clerk, Mr. Tom James.

Mr. Copperthite, do you agree, obviously in addition to myself, that I have now identified every person who is in the courtroom?

MR. COPPERTHITE: Yes, I do, Your Honor.

THE COURT: Does the government have any objection to the presence of any person who is currently in the courtroom?

MR. COPPERTHITE: No, sir.

THE COURT: Very well.

Now, determining as I have that we should conduct these proceedings in accordance with the statute set out for juvenile delinquency matters, I am turning to section 5034 of

Title 18 of the United States Code.

I would ask, Mr. Copperthite, if you could, to elaborate on your contention that the person who is here in court with us and that is the subject of these proceedings is a juvenile. Why do you believe that?

MR. COPPERTHITE: Just one moment. If you would bear with me, Your Honor.

THE COURT: That would mean that this is a person who as of today has not yet reached his 18th birthday.

(Pause in the proceeding.)

MR. COPPERTHITE: He has not reached his 18th birthday, Your Honor. He has a date of birth of February 18, 1985.

THE COURT: And if you would elaborate on that proffer. Why do you believe that that is true?

MR. COPPERTHITE: Your Honor, the agents have had the opportunity to identify him through fingerprints and other means of identification.

THE COURT: Okay. Then let's proceed one further step. To the extent that you believe the government has done that successfully, who does the government believe this person to be?

MR. COPPERTHITE: This person is Lee, middle name Boyd, B-o-y-d, Malvo.

THE COURT: Lee Boyd, B-o-y-d. And the last name is?

MR. COPPERTHITE: Malvo.

THE COURT: Spelled?

M as in Mary.

A as in Adam.

L.

V as in Victor.

O as in Oscar.

THE COURT: Okay. And, again, the date of birth?

MR. COPPERTHITE: The date of birth is February 18, 1985.

THE COURT: 2-18-85?

MR. COPPERTHITE: Yes, sir.

THE COURT: So, in 2000, he would have been 15; in 2001, 16; in 2002, 17; and this coming February 18th, you believe he would turn 18?

MR. COPPERTHITE: That is correct, Your Honor.

THE COURT: Okay. Very well.

Well, sir, I am going to address you as Mr. Malvo. I am not in a position to -- I don't know what your name is other than what the government has told me.

My first question of you is this: Are you under the age of 18?

There's no positive or negative response.

Do you speak and understand the English language?

There's no positive or negative response.

Upon the government's representation, which seems to have a factual basis, and I so find, I am going to conclude for purposes of this proceeding that the defendant is a juvenile under federal law, not having reached his 18th birthday.

Under Section 5034 of Title 18, I conclude that no parent of this person said to be Mr. Malvo is present.

Before I do that finally, Mr. Copperthite, do you have any reason to believe that a parent of his is present here, certainly not in the courtroom, but in the courthouse or on the premises, or is otherwise in contact with the executive branch of government in relation to these matters?

MR. COPPERTHITE: No parent is present, Your Honor. The last conversation that we had with the person who was identified by telephone as the defendant's mother was sometime early this morning, probably around 3:00 or 4:00 a.m. Mr. Trusty was present when an agent called this person believed to be the defendant's mother. She was in Tacoma, Washington, and we reached her by telephone.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Graham, you are a member of the bar of this court

and have been for many years. You are a member of this court's Criminal Justice Act Felony Panel, you are a named partner in a prominent Baltimore, Maryland law firm, and you are someone I deem to be fit to serve in this capacity if you are willing to do so. Are you willing to serve as the guardian ad litem of the person seated in the courtroom whom we believe to be the juvenile Lee Boyd Malvo?

MR. GRAHAM: Yes, Your Honor.

THE COURT: And I take it you are accompanied by your partner?

MR. GRAHAM: Max Lauten.

THE COURT: And it would be your intention that Mr. Lauten would assist you in the performance of your guardianship in this regard; is that right?

MR. GRAHAM: That is correct, Your Honor.

THE COURT: I'm not sure whether it is technically necessary to make Mr. Lauten a co-guardian, but it will clearly be the Court's understanding that with Mr. Graham the primary appointee, the two of you are authorized to function in that capacity from our standpoint.

If you would please come up to the table.

(Mr. Graham and Mr. Lauten complied.)

THE COURT: What we are going to do next is to conduct what we would normally refer to as an initial appearance, but we are not going to do that immediately because certain matters

must be inquired into during the initial appearance. In order for the alleged material witness to offer answers to the questions that are going to be put to him, offer them with the benefit of appropriate advice from his guardian, we are going to take a recess to allow the guardian and Mr. Lauten to meet with this person.

Mr. Marshal, where would be the most convenient place to conduct that discussion, back in the general lockup facility of the courthouse or on this level, and do you want the guardians to go with him at this point or meet him somewhere else?

CHIEF DEPUTY MARSHAL DONOVAN: Your Honor, I would suggest the attorney conference room in our cell block on the sixth floor.

THE COURT: Very well. Then I am going to remand the person I believe to be Mr. Malvo to the custody of the United States Marshal, there having been at least a first appearance if not technically an initial appearance here in federal court, to be taken to the sixth floor, at which location the Marshal shall facilitate a conference between the court-appointed guardian ad litem and Mr. Lauten and Mr. Malvo.

Mr. Graham, if you would advise the Marshals when your conference has concluded and you are ready for the commencement of the initial appearance.

MR. GRAHAM: All right, Your Honor. Thank you.

THE COURT: We are in recess.

(At 3:10 p.m., the recess commenced.)

(At 3:58 p.m., the proceeding resumed.)

THE COURT: Be seated, please.

I think two other persons are present who were not present previously. I understand they are law clerks to The Honorable Andre Davis, who is the District Court Chambers Judge today, and he has requested that they be present here.

Is there any objection from the government?

MR. COPPERTHITE: None, Your Honor.

THE COURT: Please identify yourselves.

MS. JEFFERSON: Jamilah Jefferson. I'm a law clerk for Judge Davis.

MR. PATEL: Rudhir Patel. I'm also a law clerk for Judge Davis.

THE COURT: Very well.

Ms. Martina West, an additional Courtroom Deputy Clerk, is also now present.

THE COURT: Let the record reflect that I have now entered an order appointing both Mr. Graham and Mr. Lauten as guardians ad litem in this matter. I have also directed that they be compensated pursuant to the terms of the Criminal Justice Act. This order is under seal except that it may be distributed to the persons who are appearing as counsel in this matter or as guardians.

Let me also take care of one other housekeeping matter. Mr. Copperthite, I note that the original affidavit in support of the arrest warrant, and I assume the motion for issuance of a material witness arrest warrant and probably the warrant itself, were all ordered sealed by Judge Schulze in the early morning hours of this date. It is certainly my intention to maintain that seal order. However, it is my intention to direct that copies of these documents under seal be disseminated to Mr. Graham and to Mr. Lauten with the understanding that they are restricted in terms of any further dissemination. Is there any objection from the government?

MR. COPPERTHITE: No, Your Honor.

THE COURT: Okay. We will get a copy of all this to Mr. Graham.

Mr. Graham, have you had an opportunity to consult with -- I think the proper terminology is your "ward", the person that we have reason to believe is Mr. Malvo?

MR. GRAHAM: Yes, we have had the opportunity to consult.

THE COURT: Okay. Based upon all of that, are you and your ward prepared to proceed to an initial appearance on this matter?

MR. GRAHAM: Your Honor, I think we are prepared to proceed to an initial appearance. I should say that my ward, the defendant, who we will call Mr. Malvo for present purposes,

is not inclined to discuss anything with anybody at this point. And that includes us. So, I can't approach this in a very enlightened manner, but I think we are prepared to go forward with today's hearing.

THE COURT: Okay. Then I think the first order of business is this, Mr. Copperthite. Is the government in possession of any evidence that you believe would persuade the Court that the witness, apparently Mr. Malvo, speaks and understands the English language?

MR. COPPERTHITE: If I may --

THE COURT: Do you want to consult for a moment?

MR. COPPERTHITE: Yes.

(Pause in the proceeding.)

MR. COPPERTHITE: Thank you, Your Honor.

Your Honor, it's our understanding from the evidence that we possess, a video that was created today while he was being advised or when he was interviewed by the police officers, that he did nod and understand what they were saying. We also have other evidence that he does speak as well, and that comes from several different sources.

THE COURT: All right. I think it is going to be necessary at a minimum, Mr. Copperthite, to have the government proffer what that other evidence is, because, in light of what is unfolding here before me, I have to be certain in my own mind that he understands what I am saying to him, and I don't

think it is probably sufficient for me to proceed on your representation that you believe it. I am probably required to take you to a deeper level and ask you to at least proffer. And then, depending upon how that proffer sounds, I may require you to put on some live evidence.

MR. COPPERTHITE: Yes, Your Honor. We do have information or one piece of evidence that the defendant does understand the English language when spoken to him. There was a videotape made this morning post-arrest. He was interviewed by the police officers appropriately, and he expressed that he understood things appropriately, and he chose not to speak. It's the government's position that he chose not to speak because there's incriminating evidence in this particular case involving taped conversations and phone calls that were made to different persons, including the police in this particular case.

Also, there was a witness that was interviewed extensively and debriefed extensively in the state of Washington who has had conversations with the defendant, where he spoke --

THE COURT: Do you mean this witness?

MR. COPPERTHITE: This witness, yes. Pardon me.

THE COURT: The person you believe to be Mr. Malvo?

MR. COPPERTHITE: Mr. Malvo, yes.

-- where Mr. Malvo spoke and understood the English

language.

THE COURT: Okay. At your option, and I suppose at your peril, do you want to tell me who that person is and the circumstances of that conversation? And I mean it, it is at your option.

MR. COPPERTHITE: Yes, Your Honor, I can.

THE COURT: Okay.

MR. COPPERTHITE: If you will just give me one moment.

THE COURT: Yes.

(Pause in the proceeding.)

MR. COPPERTHITE: The witness in Washington State is a gentleman named Mr. Holmes. Mr. Holmes was associated with the person Mr. Muhammad, who was in the company of Mr. Malvo in September of this year. They were out at Mr. Holmes' residence in Washington State. In fact, they spent some significant time together, where all three were in conversation. Mr. Holmes described Mr. Malvo as having a slight Jamaican accent, he also described him physically, and he said that he was traveling with Mr. Muhammad.

In addition, the three had conversations about several things, one of them being firearms, where firearms that were in the possession of Mr. Muhammad were fired into a woods and into several tree stumps. The evidence gathered from that particular residence of Mr. Holmes is now in the custody of federal agencies and is being analyzed. The evidence that Mr.

Holmes provided was proven to be truthful, and there is no reason for the government to have any question as to the information he provided, including the description and the conversations that he and Mr. Muhammad and Mr. Malvo had during that visit in September of 2002.

In addition, the government is in possession of audio tape recordings from two persons who identified themselves by certain key phrases, who were involved in the recent sniper shootings that occurred in the District of Maryland, Virginia, and Washington, D.C. There are two distinct voices on that recording. Actually, it's more than one recording. We believe that those two persons, based on the information that we have, the information that we gained from the execution of a search warrant on a vehicle and arrest warrants, that those persons were Mr. Muhammad and Mr. Malvo.

THE COURT: And those communications were in English, I take it?

MR. COPPERTHITE: They were in English, Your Honor, and one of those persons had a Jamaican-type accent. Mr. Malvo is Jamaican, and he is in a country not in a legal status.

We also obtained school records from the state of Washington. We subpoenaed school records for Mr. Malvo and also had a conversation with the principal of the particular high school where Mr. Malvo attended for a short time, and nothing in those records indicate anything other than that he

spoke and understood the English language, including documents that we believe were written by Mr. Malvo.

THE COURT: Thank you, Mr. Copperthite.

Upon that proffer from the government, I conclude for purposes of this proceeding that the person seated here before me, the person believed to be Mr. Malvo, does speak and understand the English language. Therefore, I am going to conduct this initial appearance proceeding in English, without an interpreter, on the assumption that he is understanding me.

I will give the government leave to supplement the record in this case with any other evidence or information that they may wish to submit that in their view tends to reflect on this question of whether or not the defendant speaks and understands the English language. It strikes me that this is a relatively -- well, the government will be able to submit whatever information they want, and the witness may submit information to the contrary.

So, we will now proceed to the initial appearance.

Mr. Malvo, if you would please stand up.

Let the record reflect that when I said, Mr. Malvo, please stand up, his guardian, standing beside him, stood slightly before he did, but Mr. Malvo also stood, apparently in response to my verbal direction. I can't make that finding with certainty, but I would say that I have some belief that he is understanding what I am saying, based on the interactions

here in court.

Mr. Malvo, and that is how I am going to address you, we are here for your initial appearance in this court. The purpose of this proceeding is to advise you as to why you have been brought here, to tell you what your rights are, to consider whether you will be detained or released pending any further appearances here in court, and to tell you about the date and time of any future court appearances. This is in no way a trial. It is a preliminary proceeding only.

Do you understand what I have said so far?

Let the record reflect that I have received no response from Mr. Malvo.

Mr. Graham, do you understand what I have said so far?

MR. GRAHAM: Yes, I do.

THE COURT: In a moment, Mr. Graham, I am going to get down to the question of whether or not legal counsel should be appointed in this case to represent your ward. Have you had an opportunity to discuss that with your ward, and are you able to inform me with respect to his wishes in this regard?

MR. GRAHAM: I have had the opportunity to discuss it, but, in view of the fact that Mr. Malvo, if that's his name, has chosen not to communicate with anybody, at this point in time at least, I really don't know his wishes. If I am his guardian, I think it would be appropriate to have an attorney appointed to represent Mr. Malvo, assuming that he or his

family cannot retain their own attorney.

THE COURT: We don't have any reason to believe at this point that they are financially or otherwise able to retain a lawyer. Do you agree with that?

MR. GRAHAM: Based on what I have seen and heard, I agree with that.

THE COURT: Okay. Based upon all of that, then the Court is going to appoint a lawyer to represent him.

In anticipation of the possible need to make such an appointment, the Court has secured the presence of a member of the Court's Criminal Justice Act Felony Panel, Mr. Joshua Treem, who has indicated that he is willing to serve in this case if appointed.

Mr. Goldsmith, would you please contact my chambers and ascertain whether Mr. Treem is there, and, if he is there, ask my chamber's staff to bring Mr. Treem to the courtroom.

(Pause in the proceeding.)

MR. GRAHAM: Your Honor, are we going to wait for Mr. Treem to get here? I have one question I thought I could address to the Court.

THE COURT: Yes. Go ahead.

MR. GRAHAM: The various documents that are under seal --

THE COURT: Yes. That's where I am going next.

Mr. Copperthite, they were unsealed, weren't they, for

purposes of -- not unsealed, but did I ask you whether or not you objected to their being revealed to Mr. Graham and Mr. Lauten?

MR. COPPERTHITE: I have no objection. We sealed them because this is a juvenile proceeding, so there are other protections as well.

THE COURT: Exactly. And while we are on the subject, I take it the government has no objection that these documents be revealed to Mr. Treem?

MR. COPPERTHITE: No, sir.

THE COURT: Okay. Mr. Treem is appointed, at least now orally, and that will be followed up formally later by a written order, and I will now order that these documents remain under seal, but that they may be revealed to Mr. Graham and Mr. Lauten and Mr. Treem.

Mr. Graham, was there anything else?

MR. GRAHAM: Yes. The documents are under seal, and the courtroom is closed, and I understand this is a confidential in camera type of hearing. Does that mean that no one, including counsel, guardians, counsel for the government, nobody, should be discussing any of the events that have been discussed here or any of the proceedings that have occurred here outside of this courtroom?

THE COURT: Well, first of all, there is no way the Court can put a gag order on your client. Of that I am

absolutely certain. He retains his full rights under the First Amendment to the United States Constitution.

As to the authority of other persons to discuss this matter, Mr. Copperthite, it strikes me that the juvenile procedures address that. Are you on top of that maybe a little bit more than I am?

MR. COPPERTHITE: Your Honor, I believe it's in the 5030 sections. Let me find the correct one.

THE COURT: Let the record reflect that Mr. Treem is now present in the courtroom, with the Court's permission.

Go ahead, Mr. Copperthite.

MR. COPPERTHITE: It's my understanding that it is not a matter of discussing --

THE COURT: Where are you?

MR. COPPERTHITE: I believe I am at 50 -- it's the protection of a juvenile's confidential information. I'm looking for that section.

THE COURT: Section 5038 says:

Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances:

MR. COPPERTHITE: Yes. And there is another statute,

Your Honor.

THE COURT:

Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application ...

MR. LAUTEN: Your Honor, this is not a delinquency proceeding, as I understand it.

THE COURT: You are absolutely correct in that regard, but I think the witness still has essential rights here.

My law clerk is now directing my attention, and I had just gone to the same point, to 5038(b) and (c).

District courts exercising jurisdiction over any juvenile shall inform the juvenile, and his parent or guardian, in writing in clear and nontechnical language, of rights relating to his juvenile record.

Of course, what is his juvenile record?

I think the common understanding of that is record of any arrests or convictions as a juvenile.

Mr. Graham, how do you read that language?

MR. GRAHAM: How do I read it, Your Honor?

THE COURT: Yes.

MR. GRAHAM: It sounds like what you just interpreted to me, but I am honestly not an expert on that subject.

THE COURT: I am now looking at (c):

During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section is to receive juvenile records.

For the record, I am going to order on an omnibus basis that that shall include the guardians in this case.

That having been said, there is no restriction there on the guardians and the counsel for the juvenile in what they may reveal.

What do you say about that, Mr. Copperthite?

MR. COPPERTHITE: I agree that is what that section says.

Your Honor, I believe there is a confidentiality section for a juvenile's identity as well. That is what I am trying to find. I apologize.

THE COURT: That's all right. This is not a common proceeding. We'll take our time and get it right.

(Pause in the proceeding.)

MR. COPPERTHITE: Your Honor, it is 18 U.S.C. 3509.

THE COURT: Yes, Child victims' and child witnesses' rights. He is a child witness. That is what I am reading.

(Pause in the proceeding.)

MR. COPPERTHITE: If there is any concern from counsel, Your Honor, the government is prohibited unless the juvenile would be charged as an adult. That is not the situation we have in this courtroom today.

THE COURT: I think that probably is clear. Counsel and the guardians may be concerned about what restrictions they are under.

MR. GRAHAM: My concern is twofold. One, I want to make sure that the government does not make any statements or create any publicity, which, under the rules, it should not, that might prejudice my ward.

And I also want, to the extent that we can get it, the Court's guidance as to how Mr. Lauten and I should comport ourselves, because, frankly, there is a ton of people outside that obviously have questions. If the answer to all of their questions should be, under the rules, we have no comment at all, then that is what it will be.

MR. COPPERTHITE: Of course, Your Honor, that would be the response from the government.

THE COURT: Let's take a look at 3509(h), which is maybe where I should have been in the first instance.

The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child.

Well, wait a minute. You're not alleging that he is a witness to a crime involving abuse or exploitation, are you? Or are you?

MR. COPPERTHITE: No, Your Honor.

THE COURT: All right. So, I am not appointing the guardian ad litem pursuant to this provision. I am appointing him pursuant to the original 5034 that we talked about previously. Let's still see if we can't find some guidance in here.

(Pause in the proceeding.)

MR. COPPERTHITE: Your Honor, I believe it's section (d).

THE COURT: Yes, privacy protection.

MR. COPPERTHITE: It's page 971.

THE COURT: It's page 1042 in my book. What color is your book, blue or white?

MR. COPPERTHITE: I had a white one. This one has now turned red, so I apologize.

THE COURT: I think they're updating these about every 60 days now.

Okay. Who is a person acting in a capacity described

in subparagraph (B)?

all employees of the Government connected with the case, including ... employees of the court; the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding;

MR. LAUTEN: Your Honor, there is no defendant that we know of.

THE COURT: Right. The question is whether I am going to say that inferentially he is in the same status here.

keep all documents that disclose the name or any other information concerning a child in a secure place ...

This is guidance only, but, the witness being a juvenile, I am going to enter an order restricting his guardians and Mr. Treem, who -- Mr. Treem, you have been appointed -- who was appointed before he came into the courtroom in this case, and the restrictions that are placed on Mr. Graham and Mr. Lauten and Mr. Treem are those that are set out in Title 18 of the United States Code Section 3509(d)(1).

To explain my order, all of these attorneys have been appointed at the direction of the Court, none of them at the request of the witness who is here, whom I believe to be under

the age of 18 years and with respect to which the Court has some parens patriae responsibilities.

So, while this sort of restriction would be highly unusual, if not unlawful, in the case of an adult standing before the Court, I do believe that I am empowered, and in fact duty-bound, by my obligation to this child to order you to so conduct yourselves.

Mr. Graham, Mr. Lauten, Mr. Treem, I will hear any of you if you wish to ask me to reconsider this, but, other than that, I think that is the right ruling.

There's no response from any of counsel.

MR. GRAHAM: Only this, Your Honor. If on further review of this we have a different view, we will come back to Your Honor and ask that you change the order.

THE COURT: Absolutely. For the time being, you are so bound, but it is subject to reconsideration. We are proceeding very quickly this afternoon, without a great deal of research, and, of course, the Court will consider any submissions that any party may make.

Turning to the government, you are restricted by this act as well as the overall juvenile procedures which I previously ordered are going to obtain in this case, and I think you are fully aware of that and intend to comply with that.

MR. COPPERTHITE: Yes, Your Honor.

I would just like to note for the record that anyone who has seen the newspapers or any of the media in the last day know that Mr. Malvo's name is out in the media and in the newspapers, so that is something I think the Court needs to be aware of. He has been identified by the media.

THE COURT: Well, let me say this. I have no illusions about the scope of my actual authority in this case. I know what my written authority is. But it is the Court's directive that with respect to any matters involving this child that are within the jurisdiction of this Court, persons and law enforcement are to respect the privacy of the witness to the full extent they are able and as required, as they would be required if this witness were a defendant. I think that is enough for me to say.

You take it from there, Mr. Copperthite.

MR. COPPERTHITE: Your Honor, in anything that has been filed regarding this witness, this witness has never been identified by the government. And anything that has been filed was filed under seal and will, of course, remain that way.

THE COURT: And I would expect that you would carry my instructions to various law enforcement agents and officers who are working on this matter.

MR. COPPERTHITE: Yes, sir. They have been so instructed, and I will continue to do that.

THE COURT: Okay. Very good. Now let's go back to

the initial appearance.

Mr. Graham and Mr. Treem, have you received copies of a document entitled -- the first page of mine is entitled Motion to Seal Material Witness Warrant. The next page is entitled Affidavit in Support of Arrest Warrant. Paging on further, In Re Grand Jury Subpoena Material Witness and Motion for Issuance of Material Witness Arrest Warrant.

Do you have those documents, Mr. Graham?

MR. GRAHAM: Yes, Your Honor, we do. And I see Mr. Treem does, too.

MR. TREEM: I think I just picked up Mr. Lauten's copies, Your Honor, but that will work.

THE COURT: Well, as long as you have copies.

Mr. Graham, have you attempted to review these documents with your ward, Mr. Malvo?

MR. GRAHAM: Yes, we have attempted to do that.

THE COURT: Would you please make it apparent to Mr. Malvo, by speaking or otherwise, that he is free to review those documents. I note for the record that he is standing right beside you.

MR. GRAHAM: Mr. Malvo, you are free to review the documents that I have already shown you and suggested you might want to look at, but if you would like to look these over further, you have a chance to do so now.

THE COURT: Mr. Malvo, do you want to take a moment

and go through these documents and read them with your guardian and the lawyer that I have appointed to represent you?

There is no response.

We will proceed.

MR. GRAHAM: Your Honor, I can say for the record that I did sort of summarize these. I don't know if Mr. Malvo understood what I said or not, but in private --

THE COURT: In private consultation you summarized them?

MR. GRAHAM: Yes.

THE COURT: Okay. Thank you.

Mr. Malvo, have you received a copy of the documents setting out the basis for your being brought here to court?

There is no response.

Mr. Graham, you have received those; correct?

MR. GRAHAM: Correct.

THE COURT: The allegation here is that Mr. Malvo is a material witness with respect to certain matters that would, if proven, amount to violations of the United States Criminal Code in the jurisdictions of the District of Maryland, the Eastern District of Virginia, and the District of Columbia, to include a so-called "spree of shootings and killings", which would amount to a violation of 18 U.S.C. Sections 1951 and 924(j).

The Affidavit goes on to detail how Mr. Malvo is, in the affiant's view, a material witness.

I note that my colleague, Chief Magistrate Judge Schulze, having reviewed all of this, did find that sufficient probable cause had been shown to indicate that he was a material witness.

Mr. Malvo, do you understand what I have explained to you about the allegations, that you are a material witness in relation to certain violations of 18 U.S.C. Sections 1951 and 924(j), involving a spree of shootings and killings in Maryland, Virginia, and the District of Columbia between October 2, 2002 and October 22, 2002? Do you understand that, sir?

There is no response whatsoever from the witness. For the record, he is staring with his eyes open, but otherwise with an expressionless face.

Mr. Graham, do you understand?

MR. GRAHAM: I understand that that is what the affidavit seems to allege.

THE COURT: Okay. Now, Mr. Malvo, I am going to advise you that being in the custody of law enforcement, you have the right to remain silent, that you are not required to make any statement, and that anything you do say may be used against you in future court proceedings.

I also advise you that you have the right to be represented by an attorney at all stages of these proceedings and any related proceedings from this point forward. This

means that you have the right to legal counsel during any questioning by the government, during any investigative proceedings, and certainly during all future court appearances. If you cannot afford an attorney, one will be appointed for you, to be paid for by the government, without any cost to you.

Mr. Malvo, do you understand your right to remain silent?

There is no response from Mr. Malvo, although his eyes are open and he is looking directly at me.

Mr. Graham, as guardian, do you understand your ward's right to remain silent?

MR. GRAHAM: Yes, Your Honor.

THE COURT: Mr. Malvo, do you understand your right to legal counsel in this matter?

Again, there is no response whatsoever from the witness.

Mr. Graham, as guardian, do you understand your ward's right to legal counsel?

MR. GRAHAM: Yes, Your Honor.

THE COURT: This is the point at which I would place the witness under oath in order to make certain inquiries of him pertaining to his identity, --

(Gregory Welsh, First Assistant U.S. Attorney, then entered the courtroom and conferred with Mr. Copperthite and Mr. Trusty.)

THE COURT: -- and to ascertain whether he wishes counsel to be appointed for him, and whether he qualifies for the appointment of legal counsel.

Mr. Malvo, are you prepared to raise your right hand and take an oath to tell the truth and answer certain questions at this time?

There is no positive response. Mr. Malvo continues to look at me. He is clearly awake and is --

(Mr. Welsh then left the courtroom.)

THE COURT: -- standing on his own. His eyes are open, and his face is expressionless.

That is a question, Mr. Graham, which I do not believe you are able to answer or really contribute to on behalf of your ward.

In light of the fact that Mr. Malvo is completely nonresponsive in this proceeding, I am going to conclude, based on the information that has been proffered here in the court and the somewhat unusual circumstances, that he is indigent and unable to retain legal counsel on his own.

Mr. Graham, do you have any reason to believe otherwise?

MR. GRAHAM: No, I don't.

THE COURT: Based on all of that and Mr. Graham's views, I am going to go ahead and appoint legal counsel to represent the defendant under the Criminal Justice Act. I have

done that informally already, and Mr. Joshua Treem of this Court's Felony Criminal Justice Act Panel has been in the courtroom now for some time.

Mr. Treem, are you available to accept representation to represent Mr. Malvo, with Mr. Graham and Mr. Lauten as his guardians ad litem?

MR. TREEM: Yes, Your Honor.

THE COURT: Very well.

Mr. Copperthite, of what nation do you believe the defendant to be a citizen or national?

MR. COPPERTHITE: We obtained the witness' case file from INS, Your Honor. He was born in Jamaica and is a Jamaican national.

THE COURT: He is not a naturalized United States citizen, to your knowledge?

MR. COPPERTHITE: He is not.

THE COURT: All right. Do you know -- I am not in my normal courtroom where I have my handy-dandy chart. Do you happen to know whether Jamaica is a mandatory or nonmandatory consular-notification nation?

MR. COPPERTHITE: We have complied with Jamaica either way.

THE COURT: All right. In other words, you have made notification?

MR. COPPERTHITE: That is correct, although it is not

required.

THE COURT: It is not mandatory?

MR. COPPERTHITE: It is not mandatory.

THE COURT: Okay. The treaty nonetheless requires this Court at his first appearance to advise him, and I will do so.

Mr. Malvo, I don't have the formal language of the treaty in front of me, but I think I can paraphrase it satisfactorily. I have been advised that you are a national of Jamaica and not of the United States. It is my belief, upon proffer from the government, that under the Consular Treaty existing between Jamaica and the United States, the Government of the United States is not required to notify the Government of Jamaica that you are in custody here. However, this Court and the Government absolutely will notify the Government of Jamaica as to the fact that you have been arrested and detained here if you wish us to do so.

The advisement, as I recall it, requires me to point out to you that consular officials from your country could be of assistance to you in that they may notify your family members that you are in custody in the United States, and they may be able to assist you in obtaining legal counsel in this case.

Mr. Malvo, do you request that the Jamaican consular officials be notified of your current detention in this

district?

There is no response from Mr. Malvo. His eyes are open, and he is looking at me, but he has made no response.

Mr. Graham, do you feel comfortable answering that inquiry on behalf of your ward?

MR. GRAHAM: No, Your Honor, I really don't. I am not sure whether it would in his best interest or not for the Jamaica officials to be notified, so I can only take no position on that.

THE COURT: Thank you, Mr. Graham.

Out of an abundance of caution, Mr. Copperthite, and regardless of what the government may have already done, in light of these unusual circumstances with the witness not speaking, he is in detention, and I am going to order the government to notify consular authorities in the United States representing Jamaica that the witness is in official detention in this county.

Will you discharge that responsibility, Mr. Copperthite?

MR. COPPERTHITE: Yes, Your Honor.

THE COURT: We will next turn to Title 18 United States Code Section 3144.

(Pause in the proceeding.)

THE COURT: As far as I am concerned, the first four-fifths of the first section of this section have already

occurred by virtue of Chief Magistrate Judge Schulze reviewing an affidavit earlier today and issuing an arrest warrant for Mr. Malvo.

The statute next commands that he be treated in accordance with the provisions of section 3142, which is the very familiar regimen under which courts consider whether to detain or release persons who are brought in in custody. However, there are additional requirements here. I'll quote from the statute.

No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

What I have decided is that the appropriate way to handle this is to first march through section 3142, and only in the event that I conclude, should there be a motion, that the defendant should be detained, will I then turn to the question of whether a deposition could be conducted, and, thus, eliminate the need for detention in this case. But I think

that is premature before I decide whether there even needs to be detention here. And I am commanded to comply with 3142.

So, that is where we will begin, Mr. Copperthite. The question is, does the government contend that the witness, Mr. Malvo, is either a flight risk or that there are somehow statutory circumstances present that would make him a candidate for detention because he is dangerous, although I have a hard time imagining how that could legally be possible given the normal statutory prerequisites to detaining a person on dangerousness grounds. In other words, they have to be charged with certain offenses, and you have to make certain allegations, and so forth. But perhaps we can push that aside for a moment and just address the question of whether or not the government contends that this defendant is a flight risk.

MR. COPPERTHITE: Yes, Your Honor, the government does.

THE COURT: Okay. Now, in order for the Court to order that a detention hearing be held at some point in the future in this matter, this Court has concluded that it is necessary for the government to make a proffer to demonstrate that there is a serious risk that the person might flee.

Are you prepared to make such a proffer at this time, before I make a decision as to whether or not there will be a detention hearing?

MR. COPPERTHITE: Yes, Your Honor.

THE COURT: What is your proffer?

MR. COPPERTHITE: The proffer would begin by advising the Court that the witness, Mr. Malvo, is currently on a bond from the Immigration and Naturalization Service and that that bond was for illegal entry into the country.

I reviewed Mr. Malvo's base file from the Immigration and Naturalization Service, and two of the conditions of his bond was that he not leave the state of Washington, where the bond was set. Mr. Malvo, as you know from today, was arrested in Maryland, Your Honor, without the permission of INS to leave the state of Washington.

A series of horizontal black bars of varying lengths, resembling a barcode or a heavily redacted document. The bars are stacked vertically, with some having irregular, hand-drawn edges. The overall appearance is that of a document where the text has been completely obscured by black ink.

Do you have any such argument, Mr. Treem, at this time?

THE COURT: Then it might be appropriate to -- why don't we take a brief opportunity here to ascertain whether it would be fruitful for the Court to take a recess to allow such

a discussion to occur. Why don't you speak to Mr. Malvo and Mr. Graham for a minute, outside of everyone else's hearing, and then be able to advise the Court as to whether you request a brief recess so that you can have a discussion.

The other thing that I think should be taken up at this time, Mr. Treem and Mr. Graham, with your ward and client respectively, is the question of whether he is prepared to meet with a Pretrial Services Officer from this court so that they can conduct an interview of him and prepare a Pretrial Services Report to better inform me on the question of whether or not he is a flight risk.

We will go off the record for a moment and allow the four of you to confer in private but here in the courtroom.

(At 4:45 p.m., the conference commenced.)

(At 4:48 p.m., the conference concluded.)

THE COURT: Mr. Treem, I guess the first question is, is your client, together with his guardian, prepared to sit down and meet with the Pretrial Services Agency of this court so that they can interview him and prepare a Pretrial Release Report?

MR. TREEM: The answer to that would be no, Your Honor.

THE COURT: Okay. Then we are not going to take a recess to cause that to occur.

Now, going back to the question of whether you

believe -- the government's position is that they have demonstrated a serious risk that your client might flee if I order him released, such that they have met their threshold burden to be entitled to a detention hearing. This is not a detention hearing at this point. It is just the preliminary question of whether the government gets one.

Do you wish to comment or address that issue?

MR. TREEM: No, Your Honor, not at this time. I am not prepared to do that.

THE COURT: Based on what I have heard, -- and let the record reflect, as it already does, that Mr. Treem has been given an opportunity to consult with Mr. Graham and Mr. Malvo before being asked for his position on this issue -- I conclude that there is a serious risk that this person might flee based upon the proffer that I have heard so far, at least to the extent that the government is entitled to a detention hearing in this case.

Mr. Copperthite, I am not going to address the dangerousness issues that you have raised. I want the record to be crystal clear that I consider them to be irrelevant to the inquiry that I am conducting. This person is here solely as a material witness. I don't see any authority or any way to get authority out of the Bail Reform Act to detain a material witness on dangerousness grounds. However, there is ample authority in that same statute to order, if the facts justify

it, a detention hearing and conceivably even detention on flight-risk grounds. So, that legal authority being there, there will be a detention hearing.

Mr. Copperthite, is the government prepared to go ahead today or do you request a brief postponement?

MR. COPPERTHITE: We would request a postponement of three days, Your Honor, until Tuesday of next week.

THE COURT: Okay. Do you need the full three days? Why don't you explain to me why you need the full three days. I am allowed to grant you a postponement of up to three days if the circumstances warrant.

MR. COPPERTHITE: Your Honor, the information that I need to gather comes from a very extensive amount of data that was gathered during a recent investigation regarding this particular witness, and I have to go to many sources. It is impractical to think that I can do it in a day or two. I believe I can have all of that information together to be able to advise the Court more fully on the issue of detention on Tuesday.

THE COURT: Is there any response from you, Mr. Treem?

MR. TREEM: I am not quite sure, Your Honor, of the -- given the basis for the warrant in the first place, I don't understand Mr. Copperthite's comment about extensive evidence from many sources. Based on what I have read, the

[REDACTED]

[REDACTED]

three days to inquire into and bring to the Court's attention.

THE COURT: Thank you, Mr. Treem.

Based upon the breadth of information that is revealed in the affidavit, I find that the government is entitled to the full three days that the statute provides for. That's three business days. This is Thursday, so I find that those three days will expire at the close of business next Tuesday. We will set this matter in for a detention hearing before me in a sealed juvenile proceeding on Tuesday, October 29th, at 1:30 p.m.

Is that time convenient, Mr. Treem?

MR. TREEM: I will make it convenient, Your Honor.

THE COURT: I appreciate that.

Mr. Graham?

MR. GRAHAM: I think it is, Your Honor. I am sure that if Mr. Lauten or I are called, one of the two of us will be able to be here.

THE COURT: Okay.

Mr. Copperthite?

MR. COPPERTHITE: Yes, Your Honor. Mr. Trusty and I will be available.

THE COURT: Okay. Then that is when it will occur.

Now, Mr. Malvo and Mr. Graham, I will advise you that the same act, the Bail Reform Act, which authorizes the

government to seek an order holding Mr. Malvo in custody for some period of time, also directs that a person who is going to be subject to a detention hearing be detained between the time of the initial appearance in court -- that is, today -- and the time of that detention hearing, which I have just set for Tuesday, the 29th of October at 1:30 p.m.

So, in that connection, I am now entering an order of temporary detention, remanding Mr. Malvo to the custody of the United States Marshal pending the hearing. That will be made a part of the record in this case.

Now, unfortunately we are still not finished. There is a requirement somewhere in these statutes that I was reading prior to my coming down here that the Marshals hold the witness, who is a juvenile, in a suitable facility for the detention of juveniles. So, I would ask the government to state for the record what the Marshals' intention is in that regard.

MR. COPPERTHITE: Your Honor, I have contacted persons from the Marshals Service here, and they have asked me not to name the facility, but they have advised that they have made the appropriate arrangements to house the witness until such time as there is no need for detention. I believe that if the Court needs further information, they can contact the First Deputy Marshal, Mr. Donovan, and he would advise the Court as to exactly what arrangements were made. I don't have that

information or I would be happy to provide it to the Court.

THE COURT: Well, the difficulty is that counsel and the guardians are certainly going to need access to the witness in the interim. At a minimum, they are going to need to be advised as to his location.

MR. COPPERTHITE: I can do that, Your Honor.

THE COURT: What I will do is this. I will order the government to hold this apparent juvenile in an environment where, first and foremost, his safety can be protected and ensured to the fullest extent reasonably possible. That is number one.

Number two, that he be held in an environment where he has no contact whatsoever with any adult offenders or detainees. That does not mean he cannot see them while in transition, but I am talking about the place where he is actually housed. There needs to be at that site, at that specific location or room or whatever, no contact whatsoever with adult detainees or persons charged with offenses.

Number three, he should be held in an environment where his legal counsel and his guardians shall have reasonable access to him.

Does the government understand the Court's ruling in that regard?

MR. COPPERTHITE: Yes, Your Honor.

THE COURT: Next, and I hope last, Mr. Treem, does

your client have any health, medical, or prescription-drug issues which you wish to bring to the Court's attention at this time before he is remanded to custody?--

MR. TREEM: Your Honor, I have not had the opportunity to make that inquiry. I have been advised by Mr. Lauten that the inquiry was made and there was no response. So, I have nothing to add to that.

THE COURT: Okay. Well, this is the sort of thing that -- I have found that the defendant understands what is occurring here, and that he, by definition, then understands what I have just stated. So, I have no basis for entering a medical order and will not do so at this time.

MR. TREEM: Your Honor, can I just make one comment?

THE COURT: Yes, Mr. Treem.

MR. TREEM: Given the conditions that you have placed on where Mr. Malvo will be I guess temporarily detained and without knowing where the Marshals might wind up housing Mr. Malvo, I would just put on the record my belief that none of these conditions could be satisfied by putting him at SuperMax under any circumstances. If that is where he winds up, I would object to that on the record now.

THE COURT: All right. Your objection is noted.

The government has not stated for the record that that is the place where he will be held. The Court is not going to get into approving or disapproving particular facilities.

Instead, the Court will be guided by the principles outlined in the restrictions I established a few moments ago.

I will give this additional guidance. The Court is not saying that the witness cannot be held in an overall facility that holds adults. But if the government were to elect such a facility, they need to ensure that the restrictions that I have listed are complied with. That was my intent. It was implicit. Now it is explicit.

Are you with me on that, Mr. Copperthite?

MR. COPPERTHITE: Absolutely, Your Honor. Thank you.

THE COURT: Okay. The last matter is that the proceedings here have been taken down by a court reporter, and I am going to order that the transcript and notes of this proceeding be sealed until further order of this Court.

Is there any objection to that?

Hearing none, it is so ordered.

Is there anything else we can accomplish in these proceedings today, Mr. Copperthite?

MR. COPPERTHITE: No, sir.

THE COURT: Mr. Treem?

MR. TREEM: No, Your Honor.

THE COURT: Very well. The witness is remanded to the custody of the United States Marshal.

Counsel and the guardians ad litem are excused with the Court's thanks.

Okay. We are in recess.

(The proceeding was then concluded.)

C E R T I F I C A T I O N

I, Sharon Cook, hereby certify that I was the Official Court Reporter present during the foregoing proceeding and that this verbatim transcript is true and accurate. The proceeding was taken by me in machine shorthand, and this verbatim transcript was subsequently prepared by me utilizing the XSCRIBE Computer-Aided Transcription system.

Sharon Cook
Official Court Reporter
7522 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Telephone No.: (410) 837-2343

CW Exhibit: # 4

Date: 4/28/03

Judge: JMR

Case #: K102888

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

United States of America,

vs.

Criminal No. 02-0474

John Doe, juvenile,
defendant

Baltimore, Maryland
October 29, 2002

BEFORE: Magistrate Judge, James K. Bredar.

APPEARANCES

For the U.S.A.:

A. David Copperthite

For the defendant:

Joshua Treem

and

Andrew Graham

CW
FILED-EX # 4
DATE 4/28/03
JUDGE JMR
CASE # 102888

28

PROCEEDINGS

1
2 THE COURT: Mr. Marshal, is the courtroom door
3 locked?

4 A DEPUTY MARSHAL: Yes, sir.

5 THE COURT: Very well.

6 Mr. Goldsmith, if you would assist me, we'll take the
7 roll here.

8 Let's see, seated in the courtroom, present in the
9 courtroom today, starting in the back, the Marshal for this
10 District, Mr. Hughes; the Clerk of the Court, Miss Cannon; a
11 member of her supervisory staff, Miss Gibson. Seated in the
12 row next forward, sir, if you would identify yourself.

13 MR. CRUTHERS: Tom Crouthers from the Marshal's
14 Office.

15 THE COURT: Why don't we just have everybody identify
16 themselves as we go down the aisle.

17 MR. LANGSTON: Ken Langston, Your Honor.

18 THE COURT: With the United States Pretrial Services
19 Office.

20 MISS SKIDMORE: Barbara Skidmore, United States
21 Pretrial Services.

22 DEPUTY MARSHAL DeLERI: Steve DeLeri, United States
23 Marshal.

24 THE COURT: Sir?

25 DEPUTY MARSHAL FREDERICK: Mark Frederick, U.S.

1 Marshal's.

2 DEPUTY MARSHAL DECHUM: Jeff Dechum, U.S. Marshal.

3 THE COURT: Mr. Graham is here in his capacity as a
4 Guardian Ad Litem previously appointed by the Court.

5 MR. GRAHAM: Yes, sir.

6 THE COURT: Seated next to Mr. Graham is a person I
7 recognize as a juvenile believed to Lee Boyd Malvo.

8 Seated next to him is Mr. Joshua Treem, previously
9 appointed by this Court to serve as counsel for the juvenile
10 when he was in the status of a material witness.

11 At the government table is Mr. David Copperthite,
12 Supervisory Assistant United States Attorney.

13 At the front of the courtroom Mr. Tom James, law
14 clerk to myself; Mr. Howard Goldsmith, my courtroom deputy
15 clerk. And the court reporter, would you please identify
16 yourself, sir.

17 COURT REPORTER: Paul Mackaro.

18 THE COURT: Let the record reflect that there are no
19 other persons present in the courtroom; that the windows to
20 the courtroom, four in number, have been covered by paper. And
21 I believe it is impossible to see into the courtroom.

22 Those cautions having been taken, and the role of
23 persons present in the room having also been taken, Mr.
24 Copperthite, if you would, please, call the case.

25 MR. COPPERTHITE: We are here in the matter of John

1 Doe, juvenile, who we believe is Lee Boyd Malvo, who is with
2 counsel here.

3 Initially, we were here several days ago on a
4 material witness warrant that had been issued out of Greenbelt
5 by Judge Schultz in a matter that was before the Court.

6 The current status, at this time, Your Honor, is that
7 the government has a Motion to Dismiss the Material Witness
8 Warrant, which I have prepared, and I believe there should be a
9 copy on the trial table up there on the Bench -- excuse me
10 -- at the Bench, and an order dismissing that .

11 The defendant, Mr. Malvo, is now being charged as a
12 juvenile, since he is a juvenile charged with these offenses,
13 under a criminal information that was filed pursuant to the
14 rules, that was filed down in Greenbelt this afternoon. I
15 believe the Court has a copy of that as well. Counsel has a
16 copy. And we are here to proceed on an initial appearance on a
17 criminal information.

18 THE COURT: Thank you.

19 I will return to the matter of dismissing the
20 material witness warrant as the last order of business at the
21 conclusion of our hearing today, but I appreciate being advised
22 that you have filed such a motion with the Court.

23 Sir, are you Lee Boyd Malvo?

24 MR. TREEM: Your Honor, with the Court's permission,
25 either I or Mr. Graham will answer on behalf of Mr. Malvo.

1 THE COURT: All right. We'll proceed with that as
2 far as we can here, and I will indulge that preference as much
3 as possible. There may be matters over the course of this
4 hearing that I feel it is necessary to address your client
5 directly. If we get to that point, I will do so and we'll take
6 up your concerns at that time.

7 MR. TREEM: The answer to your question is, the
8 gentleman seated to my right is Mr. Malvo.

9 THE COURT: Okay. Thank you.

10 Mr. Treem, Mr. Graham, and Mr. Malvo, I believe that
11 Mr. Malvo has not reached his 18th birthday, based upon
12 findings that I made in a prior proceeding in this court; that
13 being the case, my question is whether your client's parent or
14 parents are present today, Mr. Treem?

15 MR. TREEM: They are not, Your Honor.

16 THE COURT: Okay. Do you anticipate their being
17 present in the immediate future and with respect to these
18 matters pending in federal court here in Maryland functioning
19 in a parental role or capacity?

20 MR. TREEM: I have no such anticipation.

21 THE COURT: Okay. Then this situation is similar to
22 that which existed last Thursday when the matter was before the
23 Court, when the government asked that the juvenile be treated
24 as a material witness.

25 And, at that time, I found that, pursuant to Title 18

1 United States Code, Section 5031, and the provisions
2 immediately thereafter, that the juvenile was in need of the
3 assistance of a Guardian Ad Litem. And, at that time, I
4 appointed Mr. Andrew J. Graham and one of his law partners, Mr.
5 Max Lauten, to serve as Guardians Ad Litem in this case.

6 It continues to be my view that Mr. Malvo is in need
7 of this sort of assistance; and, therefore, I guess the
8 question, Mr. Graham is: Are you and Mr. Treem prepared to
9 serve as Guardians Ad Litem if the Court -- if the case
10 changes direction here in the manner that Mr. Copperthite has
11 suggested that it will?

12 MR. GRAHAM: Yes, Your Honor.

13 THE COURT: Very well. Then the Court will enter a
14 new order appointing you as Guardians Ad Litem for purposes of
15 this matter, which is now styled in the United States versus
16 John Doe, juvenile.

17 I will be adding the parenthetical, right after the
18 word juvenile, Lee Boyd Malvo, close paren, in the case number
19 02-CR-0474. And although this will happen I am sure many
20 times, just at the outset, let me note that all matters
21 relating to this case are sealed.

22 All right. I am going to, because the person before
23 me is a juvenile, depart from the normal sequence that we
24 follow in an initial appearance proceeding and move directly to
25 the question of legal representation for the juvenile.

1 Now, Mr. Treem, when the juvenile was last before the
2 Court, and his status was then that of a material witness, the
3 Court appointed you to represent him. Now the status of this
4 case has changed, and my request of you, at this time, is that
5 you continue to serve as his legal counsel for purposes of this
6 hearing, and at a minimum during the coming three days, during
7 which there may be other matters of importance to your client.

8 Whether the Court will appoint you to serve as his
9 legal representative for the duration of the case is a matter
10 that I have taken under review and am still reflecting upon.

11 Are you prepared to undertake the representation of
12 Mr. Malvo for purposes of today and through Friday of this
13 week?

14 MR. TREEM: Yes, Your Honor.

15 THE COURT: Very well. Then an order will issue in
16 due course reflecting that appointment, and you are directed to
17 serve as his legal representative in these proceedings.

18 Now, we previously at the time that Mr. Malvo was
19 last before the Court, we took up the question of whether or
20 not he was able to read and understand the English language.

21 Mr. Treem, do you, your client, and Mr. Graham, wish
22 to address that question, wish to be heard on that, or do you
23 not -- do you wish to not address the Court on that issue?

24 MR. TREEM: We will take -- well, let me think
25 about that for a moment, Your Honor.

1 THE COURT: Take your time.

2 MR. TREEM: I think we will not take a position at
3 this time.

4 THE COURT: All right. Mr. Copperthite, when you
5 were last before the Court, we were faced with the situation
6 where when I attempted to address the person I believed to be
7 Mr. Malvo directly he, although apparently alert, eyes open,
8 able to respond to simple directions such as stand up, sit
9 down, and so forth, did not give any indication that he was
10 able to speak at all, let alone speak and hear and understand
11 the English language.

12 At the time of that hearing, while Mr. Malvo was
13 represented by counsel, I asked the government whether they had
14 any proof that they wished to proffer indicating that the
15 juvenile did speak and understand the English language, and you
16 made a proffer, which I then acted upon.

17 You may amplify that proffer today. You may stand on
18 that proffer. You may add evidence to it. But, I think, it is
19 necessary for me to make findings once again now that we are
20 here in an entirely new posture.

21 MR. COPPERTHITE: Your Honor, if the Court would
22 like, I can incorporate the information I provided last time at
23 the hearing; that consisted of his school records that shows
24 he reads and writes the English language, obtained from
25 Washington State, speaking to persons in Washington State who

1 all indicate nothing about any inability to understand or speak
2 the English language.

3 THE COURT: By persons, do you mean Mr. Holmes or
4 someone other than that?

5 MR. COPPERTHITE: Well, somebody at this -- the
6 principal at the high school where he was attending.

7 THE COURT: Okay.

8 MR. COPPERTHITE: And where we obtained the records.

9 THE COURT: And this principal at the high school
10 indicated that he or she had themselves spoken in English with
11 this person on prior occasions?

12 MR. COPPERTHITE: That's not -- I don't know if we
13 had that much detail. We obtained documents that we believe,
14 school records and things that were written by the defendant,
15 by Mr. Malvo.

16 In addition, the person we, Mr. Holmes, that we
17 interviewed in the State of Washington indicated, in fact, that
18 they had conversations where Mr. Malvo spoke to him along with
19 Mr. Muhammad. They had conversations while they were at Mr.
20 Holmes's residence in Topeka. I believe it's Topeka,
21 Washington.

22 THE COURT: Tacoma?

23 MR. COPPERTHITE: Tacoma. I'm sorry.

24 THE COURT: Was that in English?

25 MR. COPPERTHITE: It was in English, yes.

1 In addition, when Mr. Malvo was first brought into
2 the Montgomery County Police Station the morning of his arrest,
3 a detective interviewed Mr. Malvo, spoke to him. Mr. Malvo
4 initially nodded and acknowledged that he understood what the
5 detective was saying; however, Mr. Malvo did not speak at that
6 time.

7 So he did understand -- the detective advised me
8 that Mr. Malvo -- it is his belief that Mr. Malvo did
9 understand what was being said to him because he nodded
10 appropriately during that initial interview.

11 THE COURT: Thank you.

12 MR. COPPERTHITE: In addition, I have also received
13 information, I believe, I think it was in my conversations, it
14 may have been with Mr. Donovan, our Chief Deputy Marshal here
15 in this District, that Mr. Malvo was talking to and
16 communicating with persons while he was being detained at the
17 facility we had set up for him in Super Max during this interim
18 stay.

19 THE COURT: In English?

20 MR. COPPERTHITE: In English.

21 THE COURT: Thank you.

22 Upon this additional proffer and very much taking
23 into account the information that was presented to me the last
24 time we were assembled, I find that the juvenile, Lee Boyd
25 Malvo, is able to comprehend and understand the English

1 language, and that it is not necessary to bring any special
2 interpretation skills to the courtroom to augment his ability
3 to comprehend what is occurring here.

4 Okay. The next question is this: Mr. Treem,
5 normally when someone has been arrested in this District, the
6 Court directs that its Pretrial Services Agency send an officer
7 to meet with that person to interview them, to gather certain
8 identifying information about them, and other information that
9 might reflect upon the suitability of their being released on
10 conditions.

11 Frankly, the information is also used to determine
12 and consider whether or not, in fact, they should be held
13 without bail.

14 It's my understanding that the Pretrial Services
15 Agency has not conducted such an interview of your client.

16 Let me just confirm that with the supervisor, Miss
17 Skidmore, who is present.

18 Is that true, that no such interview has occurred?

19 MISS SKIDMORE: That is correct, Your Honor.

20 THE COURT: Okay. And so, Mr. Treem, if Pretrial
21 Services were to attempt to conduct that interview, do you
22 believe that your client would speak with them and participate
23 in that interview or not?

24 MR. TREEM: He would not, Your Honor.

25 THE COURT: Very well. In that case then, Pretrial

1 is relieved of any obligation to conduct an interview of this
2 detainee for the reason that I conclude that it would be
3 pointless.

4 Okay. The next thing I want to cover, before we get
5 into the actual advisement, is that, Mr. Copperthite, you have
6 informed me that earlier today a criminal information was filed
7 against the person you've referred to as John Doe, juvenile,
8 but who I understand you to mean as well, Lee Boyd Malvo, the
9 person you understand to be Lee Boyd Malvo, who is seated here
10 in the courtroom; is that right?

11 MR. COPPERTHITE: That is correct, Your Honor.

12 THE COURT: You presented this Criminal Information
13 to Judge Day of this Court sitting in the Southern Division;
14 is that correct?

15 MR. COPPERTHITE: Yes, sir.

16 THE COURT: All right. The first question I have for
17 you is: Turning to 5032, and specifically that provision that
18 indicates that the Attorney General shall proceed by
19 information. And just to catch you up here, I am in 1, 2, the
20 third full paragraph, which is actually one of the thinner of
21 the many unnumbered paragraphs in this somewhat inartfully
22 drawn statute, but I want to give you a chance to catch up with
23 me there.

24 MR. COPPERTHITE: Yes, sir, I have it.

25 THE COURT: I understand that an information has been

1 filed. I note that the name on the information, on behalf of
2 the United States, appears to be that the Mr. DiBiagio with
3 initials following it, which I take to be those of Mr. Trustee,
4 although I'm not sure I'm right in that regard.

5 MR. COPPERTHITE: That is correct. Mr. DiBiagio
6 authorized Mr. Trustee to sign that.

7 THE COURT: Got it. And what I am wondering is, can
8 you inform the Court as to the -- delegability I think is the
9 right term -- of the Attorney General's authority to
10 prosecute a juvenile by information? Has that authority --
11 first of all, can that authority be delegated?

12 (B) if it can be, has it been? Has it been delegated
13 to Mr. DiBiagio or U.S. Attorneys in general? And if that is
14 all true, is it delegable and has it been delegated from a
15 United State Attorney to an Assistant U.S. Attorney? Are you
16 prepared to address that today?

17 MR. COPPERTHITE: Your Honor, the information I can
18 provide to the Court is that Mr. DiBiagio had the conversations
19 outside of my presence with the Attorney General and the Deputy
20 Attorney, General Larry Thompson. And we received the
21 authority to proceed with this juvenile directly from the
22 Attorney General.

23 I have in my hand the certification to proceed signed
24 by Mr. DiBiagio. It is my understanding that the Attorney
25 General can authorize and can delegate that authority to each

1 United States Attorney to do the certification and to proceed
2 as we have here in the information.

3 Mr. DiBiagio then authorized Mr. Trustee, since he
4 was in the Southern Division and Mr. DiBiagio was here today in
5 the Northern Division, just to sign his name and place his
6 initials. But it's Mr. DiBiagio actually, actually doing the
7 certification under the delegation from the Attorney General
8 and filing the information under the authority granted by the
9 Attorney General.

10 THE COURT: All right. I'm going to tentatively
11 accept the certification, which I understand is signed by Mr.
12 DiBiagio, and tentatively accept the Criminal Information
13 initialed by Mr. Trustee, and indicating that Mr. DiBiagio has
14 given his consent by virtue of Mr. Trustee writing Mr.
15 DiBiagio's name. But I am going to order the government to
16 submit to the Court, no later than noon on Friday of this week
17 -- what is that, the 1st of November?

18 MR. TREEM: Yes, Your Honor.

19 THE COURT: Okay. No later than noon on Friday, its
20 authority for the notion that both of these powers, the power
21 to certify and the power to file the information, are, in fact,
22 delegable powers.

23 It might be that there are regulations that have been
24 promulgated in the Court of Federal Regulations. It might be
25 that there are certain standing delegations which have been

1 entered years ago. But this is a matter that I think does need
2 to be clear in the file of this case, given the very stark
3 wording of this statute, which, you know, otherwise doesn't
4 seem to permit this.

5 I am going ahead regardless, because it is my
6 experience that there are other authorities that do allow
7 certain statutory powers of the Attorney General or United
8 States Attorneys to be delegated. And I am not going to
9 require the government to put that of record today as a
10 consequence. So Friday by noon for that.

11 I am examining the certification to proceed under the
12 Juvenile Justice and Delinquency Act. There is a reference to
13 28 CFR point -- well, 0.57. So that may be the starting
14 point for you, Mr. Copperthite, in terms of the submission to
15 me.

16 MR. COPPERTHITE: That would probably be it, Your
17 Honor. And I will flesh that out for you.

18 THE COURT: Thank you.

19 I find that contingent upon the Friday's submission
20 indicating that this is, in fact, the certification of the
21 Attorney General or an authorized delegee, that the Attorney
22 General of the United States, within the meaning of that Title
23 18 United States Code, Section 5032, has certified that this
24 juvenile -- and I am just going to alter this -- well, I
25 won't alter it.

1 I will, for the record, indicate that where it says
2 John Doe, juvenile, I am interpreting that to mean John Doe,
3 juvenile, and the person known to me then as Lee Boyd Malvo.

4 MR. COPPERTHITE: That is correct, Your Honor.

5 THE COURT: Okay. That the Attorney General has
6 certified under clause 3 of the first paragraph of Section
7 5032, that this juvenile is charged with crimes of violence
8 that are felonies.

9 And I further note that the Attorney General, through
10 the U.S. Attorney, and certified that there is a substantial
11 federal interest in this case, and the offenses which warrant
12 the exercise of federal jurisdiction thereby making out the
13 requirement of the concluding phrase of the first paragraph of
14 Section 5032.

15 Mr. James, if you would publish this to defense
16 counsel.

17 MR. TREEM: Your Honor, I have seen this. Mr.
18 Copperthite had provided me with a copy earlier in the day. I
19 have seen it.

20 THE COURT: Thank you, Mr. Treem. Can you return
21 that to the clerk.

22 And that certification is accepted for filing, Mr.
23 Goldsmith, of course, under seal along with everything else.

24 Just because it's the next item on my laundry list
25 here, I note that Mr. Malvo, when previously before me, was

1 believed by counsel for the government to be a Jamaican
2 National.

3 Mr. Copperthite, does that remain the government's
4 position?

5 MR. COPPERTHITE: It does, Your Honor.

6 THE COURT: I've conducted additional research
7 consisting of looking at my State Department chart and
8 determining that Jamaica, in fact, is a mandatory notification
9 country, something different than what I believed when I was
10 last here.

11 I recognize the consulate notification has been made.
12 Nonetheless, I am going to direct the government once again to
13 notify the consular officials of the nation of Jamaica that Mr.
14 Malvo is in official detention here, and now it is necessary
15 that you reveal that it is in relation to Hosack violations and
16 alleged murders.

17 I think it is necessary for the consular notification
18 to be complete, that the justification for the detention and
19 the reason why be explained.

20 Now, if the government takes a different view on
21 that, I know that there is no time requirement in the treaty.
22 I think it just means as soon as reasonably possible. You may
23 wish to wait to make that notification until after any such,
24 any transfer hearing might occur in this case, if that is
25 scheduled expeditiously, or you may opt to make that

1 notification immediately.

2 I am telling you from the Bench, that it's the
3 Court's view that notifying consular officials under the treaty
4 is not violation of the statutory requirements that juvenile
5 records otherwise remain confidential, and this Court's Gag
6 Order, for lack of a better term, of what information can be
7 disseminated publicly, because the two are in conflict with
8 each other.

9 I don't know how had you make a meaningful
10 notification to consular officials by saying that he's in
11 custody and I can't tell you anything else, including his name,
12 which is what 5038 would imply you would have to do.

13 So that's the Court's view and that's the direction
14 that I'm giving you. But I'm giving you some latitude in how
15 you carry that out.

16 MR. COPPERTHITE: I understand, Your Honor.

17 In fact, there's a person from the Consular who is
18 right outside the courtroom. I have been in touch with him
19 three or four times today. I have not disclosed either the
20 nature of the charges, nor did I disclose his name. They
21 already indicated they knew who he was and so forth. They were
22 notified upon his arrest.

23 THE COURT: Well, it seems to me there is an easy way
24 you could accomplish this is, you can quiz the consular
25 official about what it is that he knows and document that for

1 your file. And if he knows, then there is no reason for you to
2 tell him and raise the issue. But, otherwise, you are directed
3 to make new consular notification because he is in custody in a
4 new status.

5 MR. COPPERTHITE: Yes, sir.

6 THE COURT: Okay. Okay. Having covered those
7 matters, we'll now turn to the information itself, which I know
8 was previously filed.

9 Mr. Treem and Mr. Graham, you have a copy of the
10 Criminal Information?

11 MR. TREEM: I do, Your Honor.

12 MR. GRAHAM: Yes.

13 THE COURT: Okay. And, Mr. Lee Boyd Malvo, you may
14 stand up.

15 We are here for your initial appearance in court.
16 The purpose of this proceeding is to advise you of the charges
17 against you; to tell you what your rights are; to consider
18 whether you will be detained or released pending your next
19 court appearance; and, to set a date for your next court
20 appearance.

21 This is not the final hearing on the question of
22 whether you are a juvenile delinquent.

23 This is not the transfer hearing on the question of
24 whether your case should, in fact, be transferred over to adult
25 court for you to be prosecuted as an adult.

1 And it certainly is not your trial on the ultimate
2 question on whether or not you're guilty or not guilty of the
3 charges that I am about to discuss with you.

4 This is a preliminary proceeding only.

5 Mr. Lee Boyd Malvo, do you understand what I have
6 said to you so far?

7 (No response.)

8 THE COURT: Let the record reflect that I have no
9 response from Mr. Malvo.

10 First of all, Mr. Graham, as Guardian Ad Litem, do
11 you understand what I have just explained to your ward?

12 MR. GRAHAM: Yes, Your Honor, I do.

13 THE COURT: Do you -- can you offer a view on
14 whether or not your ward understands what I have just
15 explained?

16 MR. GRAHAM: No, Your Honor, I really can't tell you.
17 I don't have a view that I could offer to the Court as to
18 whether he understands or not.

19 THE COURT: Okay. And, Mr. Treem, you wanted to
20 address the issue of --

21 MR. TREEM: No, Your Honor.

22 THE COURT: Very well. Based upon what I have
23 previously concluded about the juvenile's capacity to
24 understand the English language, and the clarity with which I
25 think I have explained these initial matters, I conclude that

1 the juvenile does understand what is transpiring here and has
2 understood what I have just explained. There is no evidence to
3 the contrary.

4 Mr. Graham, have you received a copy of the criminal
5 information?

6 MR. GRAHAM: Yes, Your Honor. I received a copy from
7 Mr. Treem when I joined him in the lockup this afternoon.

8 THE COURT: Okay. Have you provided a copy or shown
9 a copy of this to Mr. Malvo?

10 MR. GRAHAM: Yes.

11 THE COURT: Have you either discussed it with him?
12 That's not intended as a trick question, but have you -- have
13 you -- have you read it to him?

14 MR. GRAHAM: Your Honor, without getting into the
15 details of our communications, I have gone over the substance
16 of it and tried to inform him or outlined for him what it was
17 all about. Whether he understood that or not, I can't say.

18 THE COURT: All right. Mr. Treem, same set of
19 questions to you.

20 MR. TREEM: Yes, Your Honor.

21 THE COURT: Same set of answers?

22 MR. TREEM: Yes, Your Honor.

23 THE COURT: Okay. Well, in light of the unusual
24 circumstances that we are in here in terms of the juvenile's
25 lack of communication with the Court, I'm afraid there is no

1 alternative but for the Court to review this information with
2 the juvenile. So, you may all be seated.

3 This is a criminal information. It is in many
4 numbered paragraphs that are not individually styled as counts
5 of the information. And I imagine that that is purposeful, Mr.
6 Copperthite, and that you would prefer to have me just refer to
7 this as paragraphs?

8 MR. COPPERTHITE: Yes, Your Honor.

9 THE COURT: And this information is filed under the
10 authority of the United States Attorney, subject to the
11 clarifications which will be submitted to the Court on Friday.
12 I have already concluded that this is in an acceptable form.

13 Mr. Lee Boyd Malvo, the United States Attorney
14 charges as follows:

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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Now, having completed that somewhat lengthy advisement, Mr. Malvo, if you would, please, rise, my question to you is: Do you feel that you understand the nature of the charges pending against you?

12

(No response.)

13

THE COURT: And the record will reflect that although the juvenile is looking directly at me with his eyes opened and his eyes blinking periodically, and his hands clasped behind his back, he is not making any response whatsoever, verbal or otherwise.

18

Mr. Graham, do you understand the charges that I have just explained to your ward?

20

MR. GRAHAM: Yes, I do, Your Honor.

21

THE COURT: And, Mr. Malvo, do you understand the maximum possible penalties that could be imposed upon you if you were to be convicted with respect to each and every of the allegations that I have just detailed? Do you understand that?

25

(No response.)

1 THE COURT: Again, I am receiving no response from
2 the juvenile other than he is looking directly at me.

3 Mr. Graham, do you understand the maximum possible
4 penalties that could be imposed upon your ward if he was found
5 guilty?

6 MR. GRAHAM: Yes, sir.

7 THE COURT: And, last of all, Mr. Malvo, do you
8 understand that the various penalties that I have described
9 here, could be imposed to the extent that you are convicted on
10 one or -- to the extent that you are convicted on more than
11 one of the offenses, which I have described here, do you
12 understand that the penalties that I have described could be
13 imposed upon you concurrently -- to run concurrently or to
14 run consecutively?

15 And by consecutively, I mean that the various prison
16 sentences could be ordered -- it could be ordered that you
17 serve them one after the other, that is, that they be stacked
18 one on top of the other.

19 Mr. Malvo, do you understand that?

20 (No response.)

21 THE COURT: And let the record reflect that I have
22 received no response from the defendant other than he is
23 clearly awake, looking directly at me with his eyes open.

24 Mr. Graham, do you understand the significance of
25 that last advisement?

1 MR. GRAHAM: Yes, sir.

2 THE COURT: Now, Mr. Malvo, assisted by Mr. Graham, I
3 want you to understand that you have the right to remain
4 silent. You are not required to make any statement. Anything
5 that you do say may be used against you later in future court
6 proceedings.

7 Mr. Malvo, you have the right to be represented by an
8 attorney at all stages of the proceedings from this point
9 forward. This means that you have the right to legal counsel
10 during any questioning by the government, during any
11 investigative proceeding, and certainly during all future court
12 appearances.

13 If you cannot afford an attorney, one will be
14 appointed for you to be paid for by the government without any
15 costs to you.

16 Mr. Malvo, do you understand your right to remain
17 silent?

18 (No response.)

19 THE COURT: Let the record reflect I am receiving no
20 response from the juvenile other than that he continues to look
21 at me directly. He's obviously awake. His eyes are blinking.
22 He seems attentive, but otherwise there is no response.

23 And, Mr. Graham, of course, you understand your
24 client's right to remain silent, correct?

25 MR. GRAHAM: Yes, that's correct.

1 THE COURT: And I'm sorry, your ward's right to
2 remain silent.

3 MR. GRAHAM: Right.

4 THE COURT: Turning to the right to legal counsel, I
5 have previously entered an order appointing, first of all, Mr.
6 Graham and his partner, Mr. Lauten, to serve as your legal
7 guardians. I have also entered orders appointing Mr. Treem to
8 serve as your legal counsel in this case.

9 Do you understand your right to legal counsel?

10 (No response.)

11 THE COURT: Again, there has been no positive
12 response. The juvenile continues to look at me. He's awake
13 clearly.

14 Mr. Graham, you certainly understand your ward's
15 right to legal counsel; is that correct?

16 MR. GRAHAM: That's correct.

17 THE COURT: And let me amplify that by saying this to
18 Mr. Malvo and Mr. Graham, and that is that although I have
19 appointed Mr. Treem, there is nothing to preclude Mr. Malvo
20 from retaining his own legal counsel selected entirely by
21 himself to represent him in this case.

22 Do you understand that, Mr. Malvo?

23 MR. GRAHAM: You mean at his expense?

24 THE COURT: At his expense. Let me be clear about
25 that. Thank you for that clarification.

1 He may select counsel, he is entirely free to do that
2 and to retain and hire, at his own expense, legal counsel that
3 could either work with Mr. Treem or replace Mr. Treem on this
4 is case.

5 That the government -- that the Court is not
6 forcing Mr. Malvo to only be represented by Mr. Treem. He has
7 the option of hiring or retaining other legal counsel if he
8 wishes to.

9 Do you understand that, Mr. Malvo?

10 (No response.)

11 THE COURT: Again, no positive response.

12 Mr. Graham, you certainly understand what I have just
13 explained; is that true?

14 MR. GRAHAM: That's true.

15 THE COURT: Mr. Treem, is your client now prepared to
16 take an oath and swear to tell the truth and then state and
17 spell his last name, tell us what his age is, tell us his date
18 of the birth, and tell us the address where he lives?

19 MR. TREEM: No, Your Honor, he is not.

20 THE COURT: Is he prepared to --

21 MR. TREEM: Upon my advice as well, Your Honor.

22 THE COURT: Okay.

23 MR. TREEM: He is not prepared to do that.

24 THE COURT: Okay. And is he prepared to advise the
25 Court as to whether he has taken any medication, consumed any

1 drugs or alcohol, prescribed drugs or otherwise, within the
2 last 24 hours? Is he prepared to answer that question, Mr.
3 Treem?

4 MR. TREEM: Mr. Malvo, on the advice of counsel, will
5 answer no questions put to him today, Your Honor.

6 THE COURT: Mr. Treem or Mr. Graham, do you have any
7 reason to believe that your client has consumed alcohol,
8 prescription drugs or non-prescription drugs within the last 24
9 hours, if you know?

10 MR. TREEM: I have no reason to believe that he has,
11 Your Honor, given his current location.

12 THE COURT: Mr. Graham?

13 MR. GRAHAM: Same here. To the best of my knowledge,
14 he has not, but I wasn't there.

15 THE COURT: And, Mr. Treem, do either you or Mr.
16 Graham wish to make any further record at this time on the
17 question of whether or not Mr. Malvo is competent to proceed
18 here today and into the future with respect to this case?

19 MR. TREEM: No, Your Honor.

20 MR. GRAHAM: No, sir.

21 THE COURT: Okay. Now, Mr. Copperthite, in reviewing
22 the juvenile statute, I did not specifically see an instruction
23 or a direction that the juvenile be granted a preliminary
24 hearing in relation to the charges presented against him.

25 I note that any adult in this country, regardless of

1 whether they're charged in state court or federal court, have a
2 right to an early probable cause determination in their case.
3 And that's by order of the United States Supreme Court, again,
4 is that *Gurstin versus Pugh*, I can't remember.

5 But it's fundamental learning. What I don't know off
6 the top of my head is whether a juvenile is to be afforded such
7 a right. I don't see anything in the statute addressing that.
8 And nothing in Rule 5, apparently, on its face, relates to
9 juveniles.

10 Is the government requesting that the Court schedule
11 and hold a preliminary hearing in this case? Or is it the
12 government's view that no such hearing need be conducted, that
13 the juvenile is not entitled to one?

14 MR. COPPERTHITE: It's the government's position that
15 the juvenile is not entitled to one. And, in fact, that is why
16 the procedures indicate the filing of a criminal information.

17 THE COURT: Maybe the means by which the government
18 proceeds?

19 MR. COPPERTHITE: That is correct.

20 THE COURT: All right. Mr. Treem, I'll allow you to
21 address that issue, if you wish, sir.

22 MR. TREEM: I am not prepared to address it today,
23 Your Honor. But the Court's question was one that I, in fact,
24 had in mind to raise today, as to whether or not we were
25 entitled to one. I would like the opportunity to at least look

1 into the matter and report back to the Court whether I think we
2 agree with Your Honor or not. And I will do that by Friday
3 noon as well.

4 THE COURT: Noon on Friday, simultaneous submissions
5 at the option of the parties. You are not required to make the
6 submission, but if you wish to, you may by noon on Friday,
7 addressing the question of whether or not the juvenile is
8 entitled to a preliminary hearing or other proceedings during
9 which the government would be required to demonstrate that
10 there is probable cause to believe that he is guilty of the
11 charges that they have brought.

12 All right. The next matter is the custodial status
13 of the juvenile prior to any disposition of his case. In this
14 regard, I shall be guided by the language in Title 18 United
15 States Code, Section 5035, as well as the provisions of the
16 Bail Reform Act, 18 U.S.C., Section 3141, et seq., to the
17 extent applicable.

18 Now, the language in 5035 is directly relevant,
19 specifies that every juvenile -- there is also language that
20 is applicable here in Section 5034. I'm sorry. And I actually
21 need to refer to that first.

22 Section 5034, in its final paragraph directs that the
23 Court, when dealing with a juvenile who has not been discharged
24 before his initial appearance -- and this is such a juvenile
25 -- shall release the juvenile to parents, to his guardian, his

1 custodian, or to another responsible party, upon that
2 responsible party, or guardian, or parent's, promise to bring
3 the juvenile before the appropriate Court, which is this one,
4 when requested by the Court, unless I determine, after a
5 hearing at which Mr. Malvo would be present and represented by
6 counsel, that his detention is required to secure his timely
7 appearance before the appropriate Court, or to ensure his
8 safety, special provision for juveniles that doesn't appear in
9 the Bail Reform Act, or that of others.

10 My overall interpretation of this is that I should
11 address this matter in a manner similar to that which I would
12 an adult, that is, applying all of the considerations set out
13 in the Bail Reform Act with the addition that I am to take into
14 account the juvenile's safety.

15 Mr. Copperthite, does the government have any quarrel
16 with that legal interpretation?

17 MR. COPPERTHITE: No, Your Honor, and I believe
18 that's how it should proceed.

19 THE COURT: Mr. Treem, do you have a position in that
20 regard?

21 MR. TREEM: No, Your Honor. I don't seriously
22 disagree with that, with the Court's analysis, quite frankly.

23 THE COURT: All right. In the light of all that,
24 then it's the Court's intention to proceed in pretty much the
25 normal fashion.

1 Mr. Copperthite, what is the government's position
2 with respect to the release or detention of this juvenile?

3 MR. COPPERTHITE: The government will be seeking
4 detention in a detention hearing under Section F(1)(a) and (b),
5 which is a crime of violence and an offense for which the
6 maximum sentence is life imprisonment or death.

7 THE COURT: All right. Does the government take any
8 position on flight risk?

9 MR. COPPERTHITE: Yes, Your Honor.

10 The government does believe in addition to those --
11 to that basis, the juvenile is a risk of flight.

12 THE COURT: Very well. Based upon the charges that
13 the defendant is facing, I find that the government is entitled
14 to a detention hearing at least on the first ground that Mr.
15 Copperthite has cited.

16 Mr. Treem, do you, at this time, contest the issue of
17 whether there is a -- whether the government can make the
18 minimal proffer that there is a serious risk that the defendant
19 might flee? If you do contest that, then the normal procedure
20 is to require the government to make a proffer to justify the
21 holding of a detention hearing on flight risk grounds.

22 I suppose in this case, it's a bit of a formality,
23 given that I have already determined that there is going to be
24 a detention hearing just on danger grounds. But I'll give you
25 the opportunity to raise the issue.

1 MR. TREEM: I would, Your Honor, ask the government
2 for a proffer on the flight risk issue.

3 THE COURT: Mr. Copperthite, why should the Court
4 order a detention hearing on flight risk grounds?

5 MR. COPPERTHITE: Your Honor, the juvenile was under
6 an order from INS, and a bond from INS, not to leave the State
7 of Washington. The juvenile has, by evidence, been placed not
8 only here in the District of Maryland, but also in the District
9 of Virginia, and also Montgomery, Alabama, and possibly several
10 other locations outside of the District of Washington State
11 where he was under that particular order.

12 The juvenile has been living with an adult, from the
13 best of our information, in a vehicle where they have been
14 traveling across the country. And you see the offenses.

15 But the travelling across the country, living in a
16 vehicle with no fixed address, it is the government's position
17 that the juvenile is conducting a charade before the Court, not
18 communicating with the Court, not responding to questions,
19 although we have seen him respond initially to questions posed
20 to him by the Court.

21 I have seen him respond here when the Court has asked
22 him to stand, he has stood before being indicated to stand.
23 And I think that all of this indicates his intent not to
24 cooperate. He is not cooperating with Pretrial Services. We
25 don't have any additional background information.

1 His mother is currently also under an Order of
2 Deportation with INS, and she may have a hearing sometime in
3 the in near future as well. She did not know his whereabouts.
4 We have a juvenile whose whereabouts are unaccounted for,
5 except at crime scenes. So I think the likelihood of him ever
6 appearing before any court is very, very slim.

7 THE COURT: Do you wish to be heard, Mr. Treem?

8 MR. TREEM: Not at this time, Your Honor.

9 THE COURT: Very well. I find that there is a
10 serious risk that the defendant will flee within the meaning of
11 the statutory language; and, therefore, the government has
12 justified the holding of a detention hearing on both danger and
13 flight risk grounds.

14 Now, is the government prepared to go forward today
15 with that detention hearing, or do you request a brief
16 postponement?

17 MR. COPPERTHITE: I would request that three days in
18 order to prepare for that hearing.

19 THE COURT: The statute permits the Court to postpone
20 the detention hearing on the government's motion for up to
21 three days.

22 Mr. Treem, do you wish to be heard?

23 MR. TREEM: Frankly, I would, Your Honor. I've
24 mentioned this to Mr. Copperthite, and actually maybe this
25 requires a modification of the Court's Appointment Order for

1 me.

2 Friday, which would be the third day, doesn't work.
3 I have prior court-related commitments that day. If it's at
4 all possible, I would ask that the hearing be set for the
5 afternoon of the 4th, which is a Monday.

6 THE COURT: Well, on Motion of Counsel for the
7 Defendant, the Court is authorized by the statute to put the
8 hearing off for as long as five business days. Monday would
9 fall within that time period. So if it is your Motion to
10 Postpone it until Monday, I could grant that.

11 MR. TREEM: I would so move, Your Honor.

12 And I would also ask the Court to modify the
13 Appointment Order.

14 THE COURT: Yes.

15 MR. TREEM: To allow me to appear at that proceeding.

16 THE COURT: Right. Of course, our hope is, we are
17 going to have all of that straightened out well before that.

18 First of all, Mr. Goldsmith, if you would contact my
19 chambers to learn the status of my calender for Monday, because
20 I had it set in on Friday. So let us first learn --

21 MR. TREEM: Your Honor, may we be seated?

22 THE COURT: You may be seated, yes, absolutely.

23 (There was a pause in the proceedings.)

24 THE COURT: It seems that this 1:30 hour works pretty
25 well in terms of moving the juvenile. Is that a convenient

1 time, Mr. Treem?

2 MR. TREEM: Yes, Your Honor, that's fine.

3 THE COURT: How does that sound to the government?

4 MR. COPPERTHITE: That's fine, Your Honor.

5 THE COURT: Okay. We'll do this Monday at 1:30 p.m.

6 And the Court has determined, myself and higher authorities,
7 that this matter will remain in Baltimore for this next
8 proceeding as well. So it will be in this Courtroom 3-B before
9 me at 1:30 in the afternoon on Monday for a detention hearing.

10 We are not at the conclusion of what we need to
11 cover here, but I am going to go ahead and enter the Order of
12 Temporary Detention, at this time, just so we don't forget to
13 do it.

14 And, Mr. Malvo is ordered held in the custody of the
15 United States Marshal from now until Monday, November 4th,
16 2002, at 1:30 p.m., at which time he is to be returned to this
17 Courtroom 3-B for further proceedings before me.

18 Now, Mr. Copperthite, what's the government's view
19 with respect to the transfer hearing and the scheduling
20 relating to any transfer hearing and so forth? What steps, if
21 any, does the government next have to take to cause such a
22 proceeding to be scheduled in? Are you going to address that
23 now?

24 MR. COPPERTHITE: I am not able to address it. I can
25 only tell you procedurally, that's what we would be doing in

1 the near future. However, I cannot tell the Court when that is
2 going to happen because we are waiting for other things to
3 occur.

4 THE COURT: All right. I am going to set a deadline,
5 which the government can ask for an extension of, if they need
6 it, but I think that this is the sort of thing that needs to be
7 addressed promptly. And so by Friday at noon, Mr. Copperthite,
8 the government will take up the matter in a written submission
9 to the Court of what the next procedural step should be and
10 propose a schedule on which that occur.

11 Mr. Treem, of course, you're perfectly entitled to
12 submit your own views on that issue by noon on Friday. You are
13 not required to do so, the government is.

14 MR. TREEM: Your Honor, I would prefer to see what
15 the government proposes before I respond.

16 THE COURT: Right. Well, then why don't we leave it
17 this way, this Friday noon, you can read what the government
18 submits and then you can ask for permission to submit something
19 if you think that that's appropriate.

20 Mr. Copperthite, if that becomes too much of a time
21 crunch, then you will just request additional time relief.

22 MR. COPPERTHITE: Yes, sir, thank you.

23 THE COURT: Okay. Now, although I didn't enter this
24 in writing last time, I am not going to this time. The
25 requirement of this Court with respect to that Temporary Order

1 of Detention is that the defendant be held in a manner entirely
2 consistent with the requirements of Title 18 of the United
3 States Code, Section 5035.

4 As I said previously, the Court is not going to get
5 into selecting facilities or anything of that nature. Only the
6 Court is going to, of course, order that its Detention Order be
7 carried out in compliance with Section 5035.

8 The government understand that order?

9 MR. COPPERTHITE: Yes, sir.

10 THE COURT: Mr. Treem?

11 MR. TREEM: Yes, sir.

12 THE COURT: Okay. We are down to two matters. There
13 is the issue with respect to confidentiality and secrecy of
14 juvenile proceedings. As I've said many times in this
15 proceeding, but will again now, every order entered here today
16 is ordered sealed. And the clerk will maintain it in a sealed
17 status. And I note the clerk is present and I know there is no
18 confusion about that.

19 Further, the transcript of these proceedings, whether
20 actually reduced to a transcript or kept in the form of notes,
21 shall remain sealed.

22 Mr. Reporter, do you understand that?

23 COURT REPORTER: Yes, sir.

24 THE COURT: Now, with the communication order that I
25 entered initially in court last Thursday, and I came to realize

1 was a bit too restrictive, and I modified it by the issuance of
2 a further order. And I believe both the government and counsel
3 for the defendant received copies of that. Frankly, I am not
4 sure if I've got that. It has not made it into this file yet.

5 The gist of this is that juvenile proceedings and
6 the events that occur in juvenile proceedings are to be kept
7 secret. And that's primarily pretty much exclusively for the
8 purpose of protecting the juvenile. And so we are going to
9 stick with that policy.

10 I do not have a copy of the order I entered on
11 October 25th in front of me. And I am going to orally indicate
12 as follows, and will probably follow this with a written order.

13 The new order will be: That counsel for the
14 government and the juvenile, Lee Boyd Malvo, may reveal that
15 the juvenile appeared in the United States District Court for
16 the District of Maryland before Magistrate Judge James K.
17 Bredar on October the 29th, 2002. And this time, Mr. James, we
18 will say, for preliminary proceedings. I think that's enough.

19 It's previously been indicated that Mr. Treem was
20 appointed, so there doesn't need to be anything done about
21 that.

22 The most critical part of this order, which I will
23 repeat in a new order, will be that counsel for the juvenile,
24 Lee Boyd Malvo, is permitted to reveal only such additional
25 matters as necessary to effectively represent the interests of

1 his client.

2 So, I think the intent of this is crystal clear, but
3 I am going to state it for the record anyway, that is, that
4 these matters, other than what I've -- other than
5 acknowledging that he was in court before me today for
6 preliminary proceedings, nothing else may be said or released
7 to any person, except to the extent that the effective
8 representation of this person by defense counsel would
9 reasonably so necessitate.

10 Do you understand that order, Mr. Treem?

11 MR. TREEM: I do, Your Honor.

12 THE COURT: We'll enter a written order consistent
13 with that.

14 Mr. Copperthite, you understand the Court's Order on
15 confidentiality?

16 MR. COPPERTHITE: Yes, sir.

17 THE COURT: Now, last of all, we turn to the motion
18 that Mr. Copperthite began this hearing with. I will quickly
19 review.

20 And I take it you have copy of this, Mr. Treem?

21 MR. TREEM: I do, Your Honor.

22 THE COURT: Any objection to its being granted?

23 MR. TREEM: No, Your Honor.

24 (There was a pause in the proceedings.)

25 MR. TREEM: I guess, Your Honor, the only -- no, I

1 don't have any objection quite frankly, no.

2 THE COURT: The order with respect to the material
3 witness warrant and status and hearing has been entered in the
4 form requested by the government. And it will be made a part
5 of the record in this case. And, of course, it too is under
6 seal.

7 Mr. Copperthite, is there anything else that we can
8 productively address at this time in this matter?

9 MR. COPPERTHITE: No, sir.

10 THE COURT: Mr. Treem, on behalf of Mr. Malvo, and
11 Mr. Graham, is there anything else that can be productively
12 addressed at this time?

13 MR. TREEM: Perhaps, Your Honor.

14 Last either Thursday or early Friday, my
15 understanding is that I believe Magistrate Judge Connelly
16 signed applications for search warrants which permitted the
17 government to take hair samples, saliva samples, handwriting
18 exemplars, and voice prints, or voice exemplars, from Mr.
19 Malvo.

20 The procedures to collect the samples of hair and
21 saliva were undertaken that day, which was last Friday. The
22 handwriting and voice print, or voice samples have not yet been
23 taken. The government has quite kindly acceded to my request
24 that they not be taken until such time as I be heard.

25 The warrants expire by their terms on November 2nd.

1 And I don't want the government to go attempt to take any
2 samples of voice or handwriting between now and the time at
3 least until after the detention hearing is held as scheduled
4 next Monday.

5 THE COURT: Mr. Copperthite? I'm sorry, Mr. Treem, I
6 didn't mean to cut you off. Were you finished?

7 MR. TREEM: No, Your Honor, I'm done.

8 THE COURT: Okay. Mr. Copperthite.

9 MR. COPPERTHITE: Your Honor, I believe that counsel
10 could, short of seeking another order, based on what has
11 happened over the last several weeks, I think that counsel
12 could agree to the government seeking that afterwards. I don't
13 have any objection to that.

14 But it is problematic. I mean, we have, you know, a
15 juvenile here who is apparently not cooperating. And it's the
16 government's position, again, is intentionally not cooperating.
17 And I understand counsel's request. I would -- I guess my
18 question is more to counsel is whether they are agreeing to
19 provide their -- provide these samples after the detention
20 hearing? I guess that's my request. Because the order
21 expires.

22 THE COURT: I didn't hear Mr. Treem to say exactly
23 that. But I want him to speak for himself.

24 MR. TREEM: Well, the short answer is, Your Honor,
25 Mr. Graham and I, Mr. Graham in his capacity as guardian, and I

1 are agreeable that no such samples should be given by Mr.
2 Malvo. I mean, I guess the short answer is, I believe any
3 attempt to effectuate the warrants would be futile on behalf of
4 the government. And we do not intend to have Mr. Malvo supply
5 those written or voice exemplars, if you will.

6 THE COURT: Well, it's voice and handwriting?

7 MR. TREEM: That's right.

8 THE COURT: You have not yet attempted to execute
9 Judge Connelly's warrant?

10 MR. COPPERTHITE: No. I think that in order to
11 protect the government's position, if Mr. Malvo refuses to
12 comply with that Court Order, that the government has to
13 attempt to do that and then the results of that attempt would
14 be evidentiary.

15 THE COURT: Okay. Well, Mr. Treem, are you asking
16 that they delay their attempt, or is it a foregone conclusion
17 what's going to occur when they do attempt it, so we might as
18 well have that occur so that they can move to the next phase of
19 the process however they see it?

20 MR. TREEM: Well, there's two parts to that. One is,
21 I don't think -- I don't believe standing here today that the
22 outcome or the representations that I have made, will change
23 over time. So that whether the government seeks to execute
24 today, or next week, or two weeks from now, that the result
25 would be any different, unless Mr. Graham advises me otherwise,

1 and I don't believe he will.

2 THE COURT: Right.

3 MR. TREEM: But I certainly would want to be present
4 at any attempt. If the government still thinks that an attempt
5 is necessary, fine. But, as a practical matter, I need to be
6 present for that. I would want to be present for that.

7 THE COURT: Well, let's not elevate form over
8 substance here. If your statement about your -- what you
9 anticipate to be true in the future is correct, it seems to me,
10 Mr. Copperthite, that the simplest way to handle this is to
11 request the United States Marshal, who is seated in the back of
12 the courtroom, come forward at this time and that he attempt to
13 take a voice and handwriting exemplar from the juvenile,
14 consistent with the Order that Judge Connelly has entered.

15 And if the juvenile, with his lawyer standing beside
16 him, refuses to do that, then you have attempted to execute the
17 warrant. You have gotten the cooperation, or lack of
18 cooperation that you get, and that puts you in the position of
19 moving onto the next step of that process, whatever that might
20 be.

21 MR. COPPERTHITE: I understand that, Your Honor.
22 But I don't think I would want to put our marshal in the
23 position of having to come in and testify to that. I would
24 rather have an agent who we anticipate as being a witness come
25 in and attempt to do that.

1 THE COURT: All right. Well, how about an agreement
2 then -- I'm just trying to make it convenient given a very
3 complex situation and people needing to be in a lot of
4 different places at a lot of different times. How about if we
5 schedule it to occur in open court on Monday at 1:30?

6 MR. COPPERTHITE: That's fine. That is what I am
7 asking. If we can agree to that.

8 THE COURT: It's not that I am going to ask Mr. Treem
9 now whether his client agrees to provide the handwriting or
10 voice exemplars. It's just that we would all agree that that
11 is when the government will attempt to execute Judge Connelly's
12 Order, Judge Connelly's warrant. And then what happens,
13 happens.

14 I don't know what's going to happen. But at least
15 we'll know that Mr. Treem and Mr. Graham will be here. And it
16 can all be done in a very orderly environment. You can have
17 your agents here, and whatever occurs, occurs.

18 Now, I understand there's an expiration date on the
19 warrant of the 2nd of November. But I think that if both
20 parties are in agreement, we probably don't even have to go
21 back to Judge Connelly. I could just extend his warrant until
22 the close of business on Monday the whatever -- the 4th of
23 November.

24 MR. COPPERTHITE: That's agreeable to the government.

25 THE COURT: Is that agreeable to you, Mr. Treem?

1 MR. TREEM: Well, I have never seen the affidavit in
2 support of the warrant, Your Honor. So I am not really in the
3 position to opine as to whether or not Judge Connelly had
4 probable cause in the first place.

5 THE COURT: Okay. Well, that's -- that's a
6 legitimate position. And then, I suppose, neither am I without
7 your agreement.

8 Okay. I will advise Judge Connelly of the
9 circumstances that are present here. I'm going to direct that
10 the government, before the close of business tomorrow, put a
11 request to Judge Connelly to extend the deadline of the
12 execution of this warrant from the 2nd of November -- was
13 that the 10th day? Is that why it says October 2nd -- or
14 November 2nd, Mr. Copperthite?

15 MR. COPPERTHITE: I don't have a copy of that in
16 front of me, Your Honor --

17 THE COURT: Well --

18 MR. COPPERTHITE: -- to tell you.

19 THE COURT: -- I think that if there is good cause
20 shown, there is no reason why it cannot be extended by Judge
21 Connelly. That would be the good cause. And the remedy is
22 just to issue a whole new warrant. And that's not going to
23 affect anything substantive.

24 So, the government, by the close of business
25 tomorrow, will put a request to Judge Connelly requesting that

1 he extend the time during which the warrant may be executed,
2 through the day on the 4th of November.

3 Assuming Judge Connelly grants that request, then
4 there is an informal agreement on the part of all of us present
5 here, that the government will attempt to execute their warrant
6 here in court on the 4th of November.

7 Are you with me on that, Mr. Copperthite?

8 MR. COPPERTHITE: Yes, sir.

9 THE COURT: And Mr. Treem?

10 MR. TREEM: Yes, Your Honor.

11 THE COURT: And I'll make the internal notification
12 to Judge Connelly that he should expect such a request from the
13 government. Okay.

14 MR. TREEM: Your Honor?

15 THE COURT: Yes.

16 MR. TREEM: Can I get a copy of the affidavit?

17 THE COURT: That will be up to Judge Connelly. And I
18 don't know what the status of that affidavit is. Is it under
19 seal?

20 MR. COPPERTHITE: I believe it is under seal.

21 THE COURT: Yeah. I don't know if you would be
22 prepared to say, at this time, but possibly you would be ready
23 to move to unseal that affidavit for the sole purpose of
24 revealing a copy of it to Mr. Treem with the restriction that
25 he can't show it to anyone other than Mr. Graham. And you can

1 procedures apparently in that facility.

2 Last Friday I believe -- I believe it was doctors
3 at the facility came, and totally unannounced, withdrew blood
4 samples from Mr. Malvo. Three different samples were taken
5 from his arm. And he was led to believe that at some point
6 they will come back to take more.

7 I have no idea what the protocol is with respect to
8 that and why that is being done. My understanding is that
9 there is a procedure now in place with regard to state
10 prisoners, that under a state act that they take blood for DNA
11 purposes or just so DNA is in the record.

12 But it's my understanding from making a couple of
13 calls that federal prisoners are not subjected to that, or
14 federal detainees, which is what Mr. Malvo is. And I'm not
15 sure what the remedy is. But this shouldn't be happening, I
16 think. Should not be happening without some kind of notice to
17 me, at least, that this is going to be happening. And if the
18 facility plans to do this again, either because they think they
19 have to get more, then we certainly object to anything like
20 that.

21 THE COURT: Well, let me address this this way.
22 First of all, did Judge Connelly or any other judge, to either
23 counsel's knowledge, enter an order directing that a blood
24 sample be taken from the defendant, which certainly is an order
25 that can be entered under appropriate circumstances if there's

1 some reason to do it. Court Order?

2 MR. TREEM: No, Your Honor. In fact, the warrant
3 sought by the federal government didn't ask for blood samples.

4 THE COURT: Is that right, Mr. Copperthite?

5 MR. COPPERTHITE: Your Honor, that is not something
6 that I personally worked on. I did not see that warrant.

7 THE COURT: All right.

8 MR. COPPERTHITE: I cannot answer the question.

9 THE COURT: Well, I think that -- Mr. Copperthite,
10 could you articulate a reason for why the juvenile's custodians
11 might potentially need to take his blood and have legal
12 justification to do so?

13 MR. COPPERTHITE: That I cannot. At this point, Your
14 Honor, I cannot say why. I mean, there may be protocols in all
15 of these facilities for insuring the health and safety of the
16 people in the facilities who work there as well as who are
17 housed there. I do not know if that was the reason. If it was
18 an administrative issue, or if it was issued subsequent to any
19 Court Order.

20 THE COURT: All right. Well --

21 MR. COPPERTHITE: This is the first I've heard of
22 this. So I apologize for not being able to provide more
23 information.

24 MR. TREEM: Well, Your Honor, if I can, just to clear
25 the record, I did have a conversation with -- I believe it

1 was Mr. Tempest, I believe it was -- I think it was probably
2 Wednesday of this week, maybe it was Tuesday, when this matter
3 came to light. Actually, I think it was probably Monday. And
4 he acknowledged that he had made some -- he was unaware of it
5 because, in fact, the warrant did not --

6 THE COURT: Ask for blood.

7 MR. TREEM: -- ask for blood. Right. And so,
8 apparently, he made some phone calls, and that's where I
9 learned of the protocol.

10 I subsequently spoke, I believe it was with the
11 Public Defender, just to ask whether they were aware of this
12 being done to federal detainees. And their response was, they
13 were aware that there may be a protocol with respect to state
14 prisoners --

15 THE COURT: What I'm aware of --

16 MR. TREEM: -- but not federal detainees.

17 THE COURT: I am aware of a TB test that is done
18 routinely on all of our people because that's a state
19 requirement.

20 MR. TREEM: Well, that doesn't require the amount of
21 blood samples that, apparently, may have been taken from my
22 client.

23 THE COURT: Well, off the top of my head, I don't
24 know of any federal statute that is currently authorizing the
25 accumulation of DNA-type data or whatever from accused people.

1 Well, what do you want me to do?

2 MR. TREEM: Well, I think -- I would like the, the
3 facility to be advised, either by the Court or by the Marshals,
4 that there should be no further testing or medical protocols
5 conducted of Mr. Malvo unless and until the Court's been
6 advised and counsel has a chance to respond in some fashion.

7 THE COURT: Well, given the --

8 MR. TREEM: And also, Your Honor, an order perhaps,
9 you know, sealing the -- from anybody -- the results of any
10 test that the state may be running on this material.

11 THE COURT: Any objection to that, Mr. Copperthite?

12 MR. COPPERTHITE: Having no knowledge of any reason,
13 I can't say one way or the other, Your Honor.

14 THE COURT: All right. Well, what I will do is, I
15 will enter an order -- Mr. James, if you'll draft this --
16 I'll enter an order today that does forbid the marshals or
17 their custodians from taking any additional blood samples from
18 this juvenile unless they are specifically directed and
19 authorized to do so by Court Order. That will be in the first
20 provision, Mr. James.

21 And in the second provision, will direct the
22 government -- direct the Marshal, that's going to be the
23 government, Mr. Copperthite -- to explain by noon Friday
24 what, if any, blood samples have been taken from the juvenile;
25 where -- you know, why they were taken; where they are;

1 what use, if any, has been made of them.

2 Then in the last provision will be that the -- if
3 such blood samples exist, that the Marshal is to take custody
4 of those blood samples and not release them to anyone,
5 including any other law enforcement agency without a Court
6 Order.

7 And that effectively, I think, freezes it as of now.

8 And then, if Mr. Copperthite finds out that there's
9 some BOP or DOJ regulation that we don't know about as we are
10 sitting here right now, then we can go from there.

11 MR. COPPERTHITE: I think, Your Honor, that would
12 include any written results of any tests that have been
13 conducted to date?

14 THE COURT: Well --

15 MR. COPPERTHITE: That the Marshal has taken custody
16 of themselves.

17 THE COURT: Yeah. The Marshal's can take custody of
18 the blood samples and any data accumulated from those blood
19 samples, should gather it all together and take it into his
20 custody, and safeguard it without further dissemination of the
21 blood or data pertaining to it, to anyone without a Court
22 Order.

23 The purpose of this is to freeze the situation until
24 we find out what are we doing here.

25 MR. TREEM: Thank you, Your Honor.

1 THE COURT: All right. Is there anything else from
2 your side, Mr. Treem?

3 MR. TREEM: No, Your Honor.

4 THE COURT: Very well. Anything else, Mr.
5 Copperthite?

6 MR. COPPERTHITE: No, Your Honor.

7 THE COURT: Then we're in recess, and the juvenile is
8 remanded to the custody of the marshal consistent with the
9 order I have previously entered.

10 Counsel is excused. Thank you.

11 (Hearing concluded.)

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1 I certify that the transcript fees charged and page
2 format used comply with the requirements of this Court and the
3 Judicial Conference of the United States.

4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.

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9 Official Court Reporter Date 3-07-03

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